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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JANE DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a witness should be permitted to invoke the privilege against adverse spousal testimony before a grand jury where the sole ground for invoking the privilege is that his or her testimony may incriminate a third party, who in turn may incriminate the witness's spouse in some future proceeding.

2. Whether the privilege against adverse spousal testimony should extend to testimony about joint criminal activity of the spouse.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 673 F.2d 688. The memorandum opinion of the district court (App. D, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on March 9, 1982. A petition for rehearing

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[1] The record in this case has been ordered sealed. See App. A, *infra*, 1a n.1. Following the approach of the court of appeals, we do not disclose the names of the interested parties. Respondent is referred to in the caption as "Jane Doe." The district court memorandum and order, which are reprinted in Appendix D, have been altered so as to substitute fictitious names for the names of interested parties.

was denied on May 4, 1982 (App. C, *infra*). On June 24, 1982, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including August 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury in the United States District Court for the Eastern District of Pennsylvania is investigating a large drug ring engaged in the distribution of methamphetamine, a non-narcotic controlled substance. Respondent, one of the participants in the ring, pleaded guilty to one count of conspiracy to possess with intent to distribute and to distribute methamphetamine, in violation of 21 U.S.C. 846, and one count of aiding and abetting the distribution of methamphetamine, in violation of 21 U.S.C. 841. The government then subpoenaed respondent to testify before the grand jury concerning events alleged to be part of the conspiracy. The questions did not relate to respondent's husband, but rather to activities of other alleged members of the conspiracy (see C.A. App. 23a-26a). Respondent was granted immunity against self-incrimination under 18 U.S.C. 6002, but she refused to testify, invoking the privilege against adverse spousal testimony. Respondent contended that, even though the government's questions concerned members of the operation other than her husband, her answers might be used against her husband.[2]

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[2] Respondent also claimed that some of the questions that the government proposed to ask her were the product of an illegal interception of an oral communication, and therefore could not be asked before the grand jury. The district court sustained the claim, and the government did not raise the issue on appeal.

The government moved to compel respondent to answer the questions (C.A. App. 8a-12a). In support of the motion, the government filed an affidavit (*id.* at 27a) certifying that "nothing said by [respondent] will be used, either directly or indirectly, against her husband * * * in any legal proceedings." In a subsequent affidavit (*id.* at 32a-33a) the government clarified its commitment, stating:

> [T]he government will not present to the Grand Jury empaneled January 28, 1981 an indictment in which [respondent's] spouse * * * is named as a defendant or as an unindicted co-conspirator. By this procedure, the government intends to effectively prevent the possibility that the Grand Jury empaneled on January 28, 1981 will consider [respondent's] testimony in deciding whether to indict her spouse * * *.

At a hearing before the district court the government acknowledged that the respondent's husband was a target of the investigation (*id.* at 154a). However, the government reiterated that the husband would not be indicted or named as an unindicted co-conspirator by the grand jury before which respondent was to testify and that respondent's testimony would not be used against her husband in any proceeding (*id.* at 153a, 155a). Rather, if respondent's testimony implicated a third party, and if the third party were thereafter willing to testify against the husband, a separate grand jury would be empaneled from which the government would seek the husband's indictment (*id.* at 157a, 159a).

The district court upheld respondent's invocation of the spousal privilege, rejecting the government's arguments that the privilege would not be infringed because the questions addressed to respondent did not relate to her husband and because her husband was not a target of the January 28, 1981, grand jury. The court reasoned (App.

D, *infra*, 31a) that respondent's testimony could nonetheless be "indirectly" adverse to her husband in that, under the government's scenario, it would implicate a third party whose cooperation the government might then obtain in seeking an indictment against the husband before a different grand jury.

2. A divided panel of the court of appeals affirmed the district court's order upholding the claim of privilege (App. A, *infra*). The majority noted that even after this Court, in *Trammel* v. *United States*, 445 U.S. 40 (1980), limited the privilege against adverse spousal testimony to protect only the right of the witness spouse to refuse to testify against the nonwitness spouse, the rationale for the privilege remained the same: the preservation of marital harmony (App. A, *infra*, 6a). It then went on to hold that "when, as in the present case, the Government openly seeks one spouse's testimony concerning the activity of a third party, who is alleged to have engaged in a common criminal scheme with a husband and his wife, and the Government thereby hopes also to reach the nonwitness spouse, the testimony sought is sufficiently adverse to the interests of the absent spouse to permit invocation of the privilege against adverse spousal testimony" (*id.* at 7a). The court reasoned that to compel the testimony of the witness spouse in these circumstances would be to permit the government to do indirectly what it could not do directly (*id.* at 7a-8a). The court further stated that "[t]he potential disruption to marital harmony is in no sense diminished because the impact of the spouse's testimony is delayed" (*id.* at 8a-9a).

The court acknowledged that continued recognition of the privilege against adverse spousal testimony may result in the withholding of probative evidence from the grand jury or at trial and may even allow a guilty party to

escape punishment (*id.* at 10a-11a). However, the court did not analyze the relevance of this concern to the case before it, but simply observed that this feature of the privilege had been carefully considered by this Court in *Trammel* and by the Third Circuit in an earlier opinion.[3]

In his dissent, Judge Adams concluded (App. A, *infra*, 16a) that the majority's holding "unduly extends the marital privilege" and is inconsistent with the dictates of this Court's decision in *Trammel*. Judge Adams observed that the privilege "was never meant to bar absolutely all testimony that, in some way, affected the relationship between the marital partners" (*id.* at 19a), and that traditionally the privilege had been limited to testimony used in the very proceeding at which the nonwitness spouse was indicted or tried (*id.* at 20a). Judge Adams concluded (*id.* at 23a) that the theoretical link between

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[3] The opinion referred to was *In re Grand Jury (Malfitano)*, 633 F.2d 276 (1980), in which the Third Circuit had held the privilege applicable to spousal testimony before a grand jury where both spouses were alleged to have participated in the crime under investigation and where the grant of immunity did not appear to extend to immunity from indictment by that grand jury.

Judge Rosenn, author of the majority opinion in the present case, did add a footnote expressing his concern about the fact that the effect of the court's holding was to protect a third party "who has no entitlement whatsoever to the benefits of the privilege" (App. A, *infra*, 11a n.12). In that footnote, in which Judge Sloviter explicitly declined to concur, Judge Rosenn suggested that the district court could avoid this result by offering to give a nonwitness spouse use-fruits immunity respecting the witness spouse's testimony unless the government decided to forgo that testimony. Judge Sloviter in her concurring opinion (*id.* at 12a-16a) and Judge Adams in his dissent (*id.* at 24a n.7) questioned whether the judicial branch has authority in a nonconstitutional setting to order that such immunity be conferred.

the respondent's testimony and the possible future indictment of her husband was "attenuated at best" and was insufficient to justify extension of the privilege beyond its traditional boundaries.

The government's suggestion of rehearing en banc was rejected, with three judges dissenting.

REASONS FOR GRANTING THE PETITION

This case presents important and recurring questions concerning the scope of the privilege against adverse spousal testimony.[4] The court of appeals held that respondent could invoke the privilege before a grand jury on the sole ground that her testimony might incriminate a third party who in turn might incriminate respondent's spouse in some future proceeding. This holding expands the traditional scope of the privilege in a manner that Judge Adams rightly termed "improvident and unnecessary" (App. A, *infra*, 23a), creating significant obstacles to the government's law enforcement efforts. Procedurally, the holding disrupts the important investigative function of the grand jury by recognizing premature claims of the privilege that operate to cut off unnecessarily the grand jury's access to relevant evidence. On the merits, this expansion of the privilege contravenes the admonition of this Court in *Trammel* v. *United States*, 445 U.S. 40 (1980), that testimonial privileges must be strictly construed, as well as the Congressional mandate, embodied in Fed. R. Evid. 501, that the federal courts should use "reason and experience" in determining the scope of a privilege. In addition, the court of appeals' failure to recognize an exception to the privilege where spouses are

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[4] The present case does not involve the privilege against disclosure of confidential marital communications. See App. A, *infra*, 1a n.2.

partners in crime places the Third Circuit in square conflict with the Seventh and Tenth Circuits. This latter issue was before this Court in *Trammel*, but the Court did not reach it in that case.

1. The court of appeals' holding expands the privilege against adverse spousal testimony in a manner that frustrates the investigative function of the grand jury. We do not here question the general availability of the privilege in a grand jury proceeding — for example, if the witness's spouse is a target of the grand jury and the witness's testimony would implicate the spouse directly. But the court of appeals in this case has held that the privilege may be invoked where (a) the questions do not relate to respondent's spouse and there is no reason to anticipate that her answers would implicate him; (b) the government has affirmed that it will not seek an indictment of respondent's spouse from the grand jury before which the respondent would testify and has promised that respondent's testimony will not itself be used against her spouse in any future proceeding; and (c) respondent's testimony is vital to the investigation of criminal activities of third parties.

The court of appeals' holding is a novel one with potentially drastic consequences for law enforcement efforts. We are aware of no other case in which a court has upheld invocation of the privilege where the spouse was not a target of the grand jury and the testimony was considered adverse only because of the possibility that the government might make indirect, or derivative, use thereof at some future point. The primary beneficiaries of the witness's invocation of the privilege in such circumstances are not the witness's spouse, but the third parties who are under investigation by the grand jury and who are thought to be important members of the criminal enterprise. This application of the privilege places the

government in a serious quandary. Although it carefully avoids questions relating to activities of the witness's spouse, the government nevertheless is forced to choose between foregoing important testimony concerning third-party members of a criminal enterprise and abandoning all efforts to indict the witness's spouse, who may also be a major figure in the enterprise.

a. This Court has recognized the importance of the investigative function of the grand jury. It has stressed the grand jury's right to every man's evidence and has warned against obstacles that delay and impede the grand jury's investigation. See, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972); *United States* v. *Calandra*, 414 U.S. 338, 350 (1974), quoting *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). The holding of the court of appeals works against these principles. The result of application of the privilege in this case is that the grand jury is deprived of relevant evidence about third parties who cannot claim any interest in the witness's marital privilege. The present case cannot be regarded as an isolated instance, since it is not uncommon that witnesses called to testify before grand juries are married to persons who conceivably have involvement in the matters under investigation. Under the court of appeals' holding any such witness may refuse to testify not only about his or her spouse, but also about the activities of any third party who may have had some connection with the non-witness spouse.

This sort of interference with the grand jury's function is particularly unjustifiable where the government has promised that the witness's spouse will not be indicted by the grand jury before which the witness testifies. In such circumstances, enforcement of the privilege before the grand jury seems clearly premature. At the time the testimony is given before the grand jury, any adverse

effect on the witness's spouse is wholly speculative. For example, in the present case there cannot be even an allegation of adverse effect unless (a) respondent's testimony leads to indictment of a third party; (b) the third party decides to cooperate with the government; (c) a subsequent grand jury is authorized to investigate the same criminal enterprise; and (d) the third party's testimony before the subsequent grand jury results in indictment of the spouse. Even if all these events were to occur, it still would be necessary to determine whether the connection between the testimony of the witness spouse and the indictment of the nonwitness spouse was significant enough to justify application of the privilege.

Given the speculative nature of any adverse effect on the nonwitness spouse, a witness such as respondent should be required to testify before a grand jury, so long as the witness's spouse will not be indicted by that grand jury. A ruling on the claim of privilege can be deferred until such time, if ever, as any arguable adverse impact develops. Such a procedure strikes a fair and reasonable balance between the government's right to investigate suspected criminal activities of third parties and the witness's interest in marital harmony.

This type of procedure is well established in cases in which a witness asserts the constitutional privilege against compelled self-incrimination. See *Kastigar* v. *United States*, 406 U.S. 441 (1972). In such cases, once the witness receives a grant of immunity that meets minimum constitutional requirements, he may not tie up a grand jury proceeding with arguments about potential future uses of his testimony, but must proceed to testify. If the government later attempts to use the witness's testimony or fruits thereof against him, a hearing is held to determine whether the government's action violates the witness's constitutional privilege against self-incrimination. *Id.* at 460-461.

Such a procedure is a fortiori appropriate in the case of the privilege against adverse spousal testimony. Unlike the privilege against self-incrimination, the privilege against spousal testimony is not rooted in the Constitution, but is based on policy considerations. See *Hawkins* v. *United States*, 358 U.S. 74, 77-78 (1958). Fed. R. Evid. 501 requires federal courts to evaluate particular applications of the privilege in the light of "reason and experience," rather than to consider the privilege in the abstract. Such an analysis must take into account factors such as the nature of the testimony, the manner in which it is used, and the nature of any impact on the nonwitness spouse — factors that as a practical matter can be adequately evaluated only at such time as an actual adverse impact on the nonwitness spouse appears likely to materialize.[5]

The marital privilege is fully satisfied, without extravagant costs to other societal interests, by the practical measure of postponing consideration of a witness's assertion of the privilege before a grand jury, so long as there is no question of the witness's spouse being indicted by that grand jury. If the government should thereafter proceed against the spouse, and it is alleged that the witness's testimony has been or is being used in that

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[5] There is precedent for deferring consideration of a claim of marital privilege where the privilege is invoked by a grand jury witness whose spouse is not a target of the grand jury. See, *e.g.*, *United States* v. *George*, 444 F.2d 310 (6th Cir. 1971), in which the court denied the claim of privilege where the witness's wife was not being investigated by the grand jury. The court stated that if the witness in fact did give inculpatory evidence against his wife and she were then prosecuted, she could object to the introduction of any statement made by her husband at the "proper stage" of her improbable prosecution. *Id.* at 314.

proceeding in violation of the privilege, a court can then consider whether the privilege should apply under the circumstances and take steps to prevent any improper use of the testimony. Cf. *Manness* v. *Meyers*, 419 U.S. 449, 474-475 (1975) (White, J., concurring). Unlike the result produced by the court of appeals holding, this approach minimizes the costs to law enforcement, since the grand jury is enabled to obtain evidence about third parties who can claim no interest in a witness's marital privilege.

b. Even if it were sometimes appropriate to honor a witness's invocation of the privilege before a grand jury investigating only third parties, recognition of the privilege was improper in the circumstances of this case. The court of appeals expanded the privilege in a manner that conflicts with this Court's statements in *Trammel* and with the Congressional mandate that common law privileges should be interpreted in the light of "reason and experience" (Fed. R. Evid. 501). This Court in *Trammel* admonished that testimonial privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Trammel* v. *United States*, *supra*, 445 U.S. at 50, quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

Rather than strictly construing the privilege against adverse spousal testimony, the court of appeals has broadened it considerably beyond its traditional scope. As Judge Adams pointed out in his dissent, the privilege was never meant to bar all testimony that affects the relationship between marital partners (App. A, *infra*, 19a). Under the common law, the privilege was limited to

testimony that "disfavors the other spouse's *legal interests in the very case* in which the testimony is offered." 8 *Wigmore on Evidence* § 2234, at 231 (McNaughton rev. 1961). (emphasis in original). Federal and state courts have characterized the privilege in this manner. See, *e.g.*, *In re Snoonian*, 502 F.2d 110, 112 (1st Cir. 1974); *United States* v. *Burks*, 470 F.2d 432, 435-436 & n.6 (D.C. Cir. 1972); *Halback* v. *Hill*, 261 F. 1007, 1009-1010 (D.C. Cir. 1919); *People* v. *Langtree*, 64 Cal. 256, 30 P. 813 (1883); *State* v. *Parrott*, 79 N.C. 615, 617-618 (1878); *State* v. *Briggs*, 9 R.I. 361, 365-366 (1869). The court of appeals went far beyond the traditional scope of the privilege by upholding its invocation on the basis of speculation about the nexus it might have to other evidence adduced in a hypothetical future proceeding.

Fed. R. Evid. 501 requires the federal courts to apply "reason and experience" in determining the scope of common law privileges, not simply to extend them relentlessly to the outer limits of their conceivable application. This Court in *Trammel* recognized that the courts must weigh the purpose served by the privilege — the public interest in marital harmony — against the burden on legitimate law enforcement needs in a particular factual setting. 445 U.S. at 52-53. The lower courts generally have applied such a case-by-case analysis, in which the public interest in disclosure of evidence is balanced against the extent to which the policy underlying the privilege would be advanced by permitting invocation of the privilege in the particular case. See, *e.g.*, *In re Grand Jury Proceedings (Appeal of Vannier)*, 664 F.2d 423, 429 (11th Cir. 1981), cert. denied, Nos. 80-1071 and 81-1108 (Mar. 8, 1982); *Ryan* v. *Commissioner*, 568 F.2d 531, 543 (7th Cir. 1977); *United States* v. *Cameron*, 556 F.2d 752, 756 (5th Cir. 1977); *United States* v. *Allery*, 526 F.2d 1362, 1366-1367 (8th Cir. 1975).

Here, the court of appeals appears not to have engaged in the sort of balancing analysis prescribed in *Trammel*, but instead produced what Judge Rosenn acknowledged was a "categorical enforcement" of the privilege (App. A, *infra*, 11a n.12). In fact, however, a balancing of the two interests in the light of "reason and experience" indicates that the extension of the privilege in this case is unwarranted. Because respondent's testimony will not implicate her husband directly and because the grand jury before which she testifies will not indict her husband, there is no direct adverse impact of the type that is normally thought to strain the marital relationship.[6] Any indictment of the husband at a later time would result directly from testimony of a third party. As Judge Adams suggests, the relationship between the respondent's testimony and any possible adverse impact on her spouse is "attenuated at best" (App. A, *infra*, 23a). Common sense suggests that any strain on the marital relationship arising from these circumstances must be far less than that resulting from direct implication of a spouse in a proceeding in which the spouse is a target. As Judge Adams observes, there is a "qualitative difference" in the impact of the testimony in these two circumstances (App. A, *infra*, 19a).

On the other hand, as described above, the burden on legitimate law enforcement that results from honoring a witness's assertion of the privilege in a case such as the present one is significant. Here, the result has been frustration of the government's efforts to obtain relevant testimony against an individual who is thought to be an important member of the drug ring under investigation.

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[6] In addition, grand jury proceedings are secret and therefore involve no element of public accusation or incrimination of one spouse by another.

Allowing the privilege to be invoked benefited not the spouse, but a third party who had no interest in the witness's privilege. Balancing of the interests in these circumstances clearly indicates that the privilege should not be recognized.

The court of appeals holding is at odds with the approach taken by other circuits, which have not recognized indirect effects of spousal testimony as grounds for permitting a witness not to testify before a grand jury. For example, in *United States* v. *Weinberg*, 439 F.2d 743 (9th Cir. 1971), the court upheld a claim of privilege asserted before a grand jury where the questions concerned the identity and conduct of persons present during meetings of alleged conspirators, who apparently included the witness's husband. The court observed, however, that the questions could be reframed so as "not to require [the wife] to disclose whether or not her husband was present or participated." *Id.* at 750 n.10. The court did not suggest that there would be any difficulty if the husband's co-conspirators were to testify against him in the future; in fact, the court apparently did not even require the government to promise that the husband would not be indicted by the grand jury before which his wife testified.

In *United States* v. *Armstrong*, 476 F.2d 313 (5th Cir. 1973), the court held that a wife could not refuse to testify before a grand jury against her husband's co-defendants where the testimony did not implicate her husband and where her husband's case had been severed from that of his co-defendants. *Id.* at 315, citing 3 *Wharton's Criminal Evidence* § 777, at 113-114 (12th ed. 1955). The court noted that the wife could be called as a witness at the trials of the husband's co-defendants and that the same rule would apply to testimony before the grand jury. *Ibid.* See also *In re Snoonian*, *supra*, 502 F.2d at 112, in which

the First Circuit stated that the marital privilege would not excuse the witness from testifying at a trial in which his wife was not a defendant even if she had been indicted and was being tried separately. In *Armstrong* and *Snoonian*, as in *Weinberg*, the courts indicated no concern about the possibility, as much present in those cases as in this, that the husband's co-defendants might later testify against the husband.

The court of appeals' holding in the present case also is inconsistent with the explicit holding of the Fifth Circuit in *Appeal of Vannier*, *supra*, that the scope of protection of the privilege against adverse spousal testimony is narrower than that of the privilege against self-incrimination. In *Vannier* the majority refused to allow invocation of the privilege where questions addressed to the wife were objective and contained no reference to her husband, even though the husband was a target of the grand jury. The majority quoted from the First Circuit's opinion in *In re Snoonian:*

> The privilege has not ordinarily been construed to allow one spouse to decline to testify merely because the testimony may incrimate [sic] the other. Wigmore, *supra* at 231, n.2.

Appeal of Vannier, *supra*, 664 F.2d at 429, quoting *In re Snoonian*, *supra*, 502 F.2d at 112. The court in *Vannier* supported its conclusion by pointing to the difference in the purposes and social values that are fostered by the two different privileges. 664 F.2d at 429.

In sum, the holding in the present case represents an unprecedented departure from the generally prevailing understanding of the marital testimonial privilege, limiting the availability of the privilege to circumstances in which the content of the testimony is adverse to the spouse and is sought to be elicited in a proceeding directed against the spouse. And even if it were deemed

appropriate at this time to introduce into the marital testimonial privilege a "fruits" component, the court of appeals has adopted an extravagant and unacceptable formulation of the concept, which threatens serious injury to the investigations of this and future grand juries and confers wholly unjustified windfall benefits on third parties who are suspected of criminal activities and who are plainly outside the intended shelter of the privilege. Such a drastic departure from the existing understanding of the proper scope of the marital testimonial privilege requires review by this Court.

2. An independent and equally significant error of the court of appeals in this case is its recognition of the privilege against adverse spousal testimony where the evidence suggests that the spouses were joint participants in criminal activity.[7] Respondent has pleaded guilty to participation in a drug conspiracy that is thought to have included her husband, and the testimony sought from her involves the activities of other individuals in that same conspiracy. The Third Circuit's refusal to recognize an exception to the privilege in such circumstances conflicts squarely with decisions of the Seventh Circuit and the Tenth Circuit. Those courts, in *United States* v. *Van Drunen*, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974), and *United States* v. *Trammel*, 583 F.2d 1166 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980), have held that the privilege is unavailable where the spouses are joint participants in a criminal enterprise.

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[7] The government raised this issue in its petition for rehearing en banc. The government's argument previously had been rejected by a Third Circuit panel in *In re Grand Jury (Malfitano)*, 633 F.2d 276, 278-279 (1980). The government noted in its rehearing petition that it had not raised the argument prior to the rehearing stage because one panel cannot overrule another panel of the same circuit.

The Seventh and Tenth Circuits have reasoned correctly that society's interest in preserving marital harmony is outweighed by the injury inflicted on the public by use of the marital relationship for illicit purposes. As the Seventh Circuit observed:

> [The] goal [of preserving the family] does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.

Van Drunen, *supra*, 501 F.2d at 1396. See also *Trammel*, *supra*, 583 F.2d at 1169-1170; *Ryan* v. *Commissioner*, *supra*, 568 F.2d at 543-544. The Seventh Circuit in *Van Drunen* noted that the privilege made the most sense in cases "where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime." 501 F.2d at 1397.

This view is consistent with reason and experience. Where spouses are co-conspirators, the injury inflicted on the public by use of the marital relationship for illicit purposes outweighs any societal interest in preserving marital harmony. Collective criminal agreement is recognized as in itself a serious danger to the public. *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Permitting invocation of the privilege in the case of conspiracy may frustrate the government's ability to obtain relevant evidence relating to key members of a conspiracy who happen to be married. At the same time, the purpose served by the privilege is weak in such circumstances. Society's interest in fostering harmony in marriages, which ordinarily may be thought to contribute to the rehabilitation of a defendant-spouse, is not well served by providing an incentive for recruiting one's spouse into

criminal activity,[8] thereby encouraging abuse of the relationship that the privilege is designed to protect. The decisions of the Seventh and Tenth Circuits embody the better view, and the Third Circuit decision in the present case should be reversed on this ground.

The analysis of the Seventh and Tenth Circuits accords with exceptions to other privileges in cases where the privileged relationship is similarly abused. Thus, it is well established that a client who uses his attorney to obtain guidance in the commission of a crime is not protected by the attorney-client privilege against his attorney's taking the stand to testify about their conversations. *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Doe*, 551 F.2d 899 (2d Cir. 1977); *Hyde Construction Co.* v. *Koehring Co.*, 455 F.2d 337, 342 (5th Cir. 1972); *United States* v. *Friedman*, 445 F.2d 1076, 1086 (9th Cir.), cert. denied, 404 U.S. 958 (1971). It has also been held that the privilege protecting confidential communications between husband and wife does not apply to communications in furtherance of criminal activity. See *United States* v. *Mendoza*, 574 F.2d 1373, 1379-1381 (5th Cir. 1978); *United States* v. *Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973); *State* v. *Smith*, 384 A.2d 687, 693-694 (Me. 1978); *People* v. *Watkins*, 89 Misc. 2d 870, 393 N.Y.S. 2d 283 (Sup. Ct. 1977); *Gill* v. *Commonwealth*, 374 S.W. 2d 848, 851 (Ky. 1964); but see *Smith* v. *State*, 344 So. 2d 915, 919 (Fla. Dist. Ct. App. 1977). The Third Circuit view, unlike that of the Seventh and Tenth Circuits, fails to recognize that the privilege against adverse testimony by a spouse, like other privileges,

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[8] As this Court observed in *Trammel*, quoting Jeremy Bentham, the privilege "goes far beyond making 'every man's house his castle,' and permits a person to convert his house into a 'den of thieves' " (445 U.S. at 51-52).

should "take[ ] flight if the relation is abused" (*Clark* v. *United States*, *supra*, 289 U.S. at 15), and that the marital relation is clearly abused where the spouses jointly participate in crime.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1982

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[9] There is no question of mootness in the present case. The term of the grand jury, which was convened on January 28, 1981, has expired. However, the government would seek to question respondent before a new grand jury it it were ultimately to prevail in this case. Accordingly, a clear controversy exists, the formal elements of which are virtually certain to recur between the same parties. See *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377-378 (1979), and cases there cited.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-1402

In re

GRAND JURY MATTER
UNITED STATES OF AMERICA,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Grand Jury No. 80-0121-4)

Argued October 29, 1981
Before: ADAMS, ROSENN, and SLOVITER, *Circuit Judges*

Opinion Filed March 9, 1982

OPINION OF THE COURT

ROSENN, *Circuit Judge.*

The United States appeals from an order of the United States District Court for the Eastern District of Pennsylvania denying the Government's motion to compel the testimony of a witness [1] before a grand jury. The witness has asserted the privilege against adverse spousal testimony, [2] claiming that

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[1] Because the record in this case has been ordered sealed, we will not disclose the names of the interested parties. *See generally* 3d Cir. R. 21(3)(a).

[2] The privilege against adverse spousal testimony, which protects the right of one spouse not to testify against the other, is to be distinguished from the privilege which protects private marital communications. Both are sometimes referred to as the "marital privilege."

any testimony by her directed to the activity of a third party would indirectly implicate her husband, who the United States has conceded is a target of the same investigation. We agree with the district court that the witness is entitled to assert the privilege and we therefore affirm its order. [3]

I.

Following her plea of guilty to one count of conspiracy to possess with intent to distribute and to distribute methamphetamine, a non-narcotic controlled substance, and one count of aiding and abetting the distribution of methamphetamine, the witness was subpoenaed to testify before a grand jury investigating the drug operation in which she had participated. She was immunized under 18 U.S.C. § 6002 (1976), [4] but exercised her privilege against adverse spousal testimony before the grand jury. The Government then moved to compel her testimony and in support of the motion filed an affidavit with the district court certifying that nothing said by the witness before the grand jury would be used, "*either directly or indirectly*, against her husband *in any legal proceedings*." (Emphasis added.) In effect, the Government appeared to promise the witness that it would confer upon her husband immunity

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[3] Although Judge Sloviter disagrees, the author of this opinion believes that the district court may have the power to insulate the witness' husband from the effect of her testimony without forcing the Government to forego her testimony about the activity of the third party. See note 12 *infra*.

[4] 18 U.S.C. §§ 6001-05 (1976), enacted as § 201(a) of Title II of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 927 (1970), authorizes a United States Attorney to grant use and derivative use immunity to an individual who refuses to testify before a court or grand jury proceeding on the basis of the privilege against self-incrimination. The person so immunized may then be compelled to testify since the compelled testimony cannot be used directly or indirectly against the witness in any criminal proceeding. *Kastigar* v. *United States*, 406 U.S. 441 (1972).

coextensive with the statutory use and derivative use immunity conferred on the witness, as a way of respecting the witness' privilege against adverse spousal testimony while pursuing other members of the drug operation.[5]

In a subsequent affidavit, however, the Government retreated from its initial offer of a broad grant of immunity protecting the husband. The affidavit provides:

> [T]he government will not present to the Grand Jury empaneled January 28, 1981 an indictment in which [witness'] spouse . . . is named as a defendant or as an unindicted co-conspirator. By this procedure, the government intends to effectively prevent the possibility that the Grand Jury empaneled on January 28, 1981 will consider [witness'] testimony in deciding whether to indict her spouse. . . .

To respect the wife's privilege against adverse spousal testimony, the Government ultimately promised only to refrain from naming the witness' husband in an indictment presented to this particular grand jury. The Government confirmed at a hearing before the district court that her husband was indeed a target of its investigation. Moreover, the Government conceded that if the wife's testimony implicated a third party, and that person was willing to testify against the husband, then a separate grand jury would be empaneled from which the United States would seek the husband's indictment.

Under her claim of privilege the witness refused to answer a series of questions concerning the involvement of the third party and others in the drug operation. Based on the Government's representations at the hearing, the district court upheld the claim of marital privilege and denied the Government's motion to compel her testimony. In holding that the *indirect* use contemplated by the Government of the witness' testimony would violate the privilege, the district court relied

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[5] Such a procedure was first used in *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974). *See* note 6 and accompanying text *infra*.

on this court's analysis in *In re Grand Jury (Malfitano)*, 633 F.2d 276 (3d Cir. 1980); it distinguished *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974), relied on by the Government. In *Snoonian*, the court permitted government attorneys to file affidavits promising not to prosecute the nontestifying spouse as a way of accommodating a claim of the privilege against adverse spousal testimony. The court held that "the speculative nature of the threat to [the nontestifying spouse], coupled with the Government's unequivocal and convincing promises not to use any of the testimony against her," *id.* at 113, nullified any claim of privilege as grounds for the witness' refusal to testify. *Id.* [6] In *Malfitano*, in contrast, this court refused to find that the Government's promise not to use one spouse's testimony against the other vitiated the privilege, since the nontestifying spouse was a target of the grand jury before which the spouse was called to testify. 633 F.2d at 279-80. [7]

In the case at bar, the district court concluded that *Malfitano* controlled.

> The only difference that exists in the present case from the *Malfitano* decision is that the testimony of the wife here will not directly implicate her husband before the same grand jury before which she is testifying. Rather, it will indirectly implicate her husband in a future legal proceeding. As such, the effect is the same; the danger to the marital relationship is as manifest.

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[6] In *Snoonian*, a husband testifying before a grand jury investigating extortionate extensions of credit attempted to assert the privilege on the ground that his testimony would subject his wife, because they had executed a joint tax return, to liability for tax fraud. 502 F.2d at 112.

[7] The spouse whose testimony was sought worked as secretary for five corporations in which her husband was president. The corporations, the husband, and others were charged with conspiracy to secure a loan from the Teamsters Union Pension Fund by paying a kickback in violation of 18 U.S.C. §§ 1341, 1343, 1954, 371 and 1962. 633 F.2d at 276-77. None of the parties disputed the probability that the wife's testimony would implicate her husband. *Id.* at 277.

In re Grand Jury, No. 80-121-4, slip op. at 6-7 (E.D. Pa. Feb. 13, 1981). The court also concluded that the Government was attempting to renege on its initial sworn promise not to use the witness' testimony, "either directly or indirectly, against her husband . . . in any legal proceedings."

II.

A.

If, as Wigmore points out, "the fear of causing marital dissension or disturbing the domestic peace" were the genuine fundament of the privilege, then the privilege should apply to any perjorative testimony toward the other spouse. 8 J. Wigmore, Evidence § 2234, at 230-31 (McNaughton rev. 1961). But this broad application of the privilege was rejected at common law and its scope confined to only such testimony as is adverse to the other spouse's legal interests in the very case under consideration. *In re Snoonian*, *supra*, 502 F.2d at 112; J. Wigmore, Evidence, *supra*, § 2234, at 231. Despite this restriction, the privilege against adverse spousal testimony has in modern times been subject to considerable criticism, [8] and the empirical basis of the privilege has been seriously called into question. [9] Nonetheless, the privilege remains an important obstacle to the admission of certain testimony in federal court. Rule 501 of the Federal Rules of Evidence provides in relevant part: "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted

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[8] *See, e.g.*, C. McCormick, *Handbook of the Law of Evidence* § 66 (2d ed. 1969); 8 J. Wigmore, *Evidence* § 2228 (McNaughten rev. 1961); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929); Reutlinger, *Policy, Privacy and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 Calif. L. Rev. 1353 (1973).

[9] *See* Rosenberg, *The New Looks in Law*, 52 Marq. L. Rev. 539, 541 (1969).

by the courts of the United States in the light of reason and experience." In *Trammel* v. *United States*, 445 U.S. 40 (1980), the Supreme Court recently redefined the scope of the privilege against adverse spousal testimony in federal court. The Court modified the rule of *Hawkins* v. *United States*, 358 U.S. 74 (1958), which had permitted a *nonwitness* spouse to invoke the privilege to prevent the witness spouse from testifying against him, and held that the privilege ran only to the witness spouse. 440 U.S. at 53. Thus one spouse may now voluntarily testify against the other. The Court refused, however, to further limit the privilege, as had been suggested by the Conference on United States Laws and others, to one protecting only confidential communications. *Id.* at 48-50. The Court examined the modern justification for the privilege, *viz.* "its perceived role in fostering the harmony and sanctity of the marriage relationship," *id.* at 44, and concluded that it had continuing vitality. *Id.* at 53.

This court had occasion to review the import of the *Trammel* decision in *In re Grand Jury (Malfitano)*, 633 F.2d 276 (3d Cir. 1980). We concluded that in *Trammel* the Supreme Court had "decided that the privilege against adverse spousal testimony remains a viable principle of federal law and only modified the privilege by vesting it solely in the testifying spouse." *Id.* at 277. As we then noted, "The crux of [the] privilege is that a person may not be forced to be a witness against his or her spouse in a criminal proceeding." *Id.*

In *Malfitano* we held the privilege applicable to spousal testimony before a grand jury where both husband and wife were alleged to have participated in the crime under investigation. We first rejected the notion that because both spouses were under criminal investigation they were not deserving of the protection against potential marital discord which the privilege affords.

> The fact that the grand jury will consider appellant's testimony and possibly indict her husband on the basis of it will put a strain on their marriage. The husband will be subjected to an indictment based in part on appellant's testimony. This is no less of a strain on the marriage than if the appellant testified at his trial.

633 F.2d at 280 (footnote omitted). The argument that the Government's promise never to use the witness spouse's testimony abrogated the need to invoke the privilege was also found unpersuasive. We observed that there was no way of preventing the grand jury from considering the witness spouse's testimony in deciding whether to indict the nonwitness spouse. *Id.* at 279. By implication we suggested that if the Government "sever[ed] the husband's indictment from that of the other defendants to ensure that the grand jury does not use appellant's testimony against her husband," *id.*, the privilege might thereby be respected. It is the question of the adequacy of this latter procedural safeguard which is now posed to this court.

B.

In the present appeal, we must decide whether the testimony which the Government is eliciting from the witness amounts to testimony "against . . . her spouse in a criminal proceeding." *In re Grand Jury (Malfitano)*, *supra*, 633 F.2d at 277. We hold that when, as in the present case, the Government openly seeks one spouse's testimony concerning the activity of a third party, who is alleged to have engaged in a common criminal scheme with a husband and his wife, and the Government thereby hopes also to reach the nonwitness spouse, the testimony sought is sufficiently adverse to the interests of the absent spouse to permit invocation of the privilege against adverse spousal testimony. As in *Malfitano*, the wife's testimony is sought with the understanding that it is likely to implicate her husband. [10] The sole difference between

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[10] In *Malfitano*, the Government wanted to ask the witness questions about telephone records of the five corporations in which her husband was president, 633 F.2d at 277; *see* note 7 *supra*, and about a meeting presumably attended by the witness and a number of others, 633 F.2d at 277. The Government conceded that it assumed that her answers would implicate her husband in the illegal kickback scheme under investigation. *Id.*

the decisions is that here the Government seeks to accomplish indirectly what in *Malfitano* we prohibited it from doing directly. The potential disruption to marital harmony is in no

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Although in this case the witness has not been asked questions about her husband's involvement in the drug operation, as a colloquy before the district court reveals, the Government, despite its representations to the contrary, hopes to use her testimony in order to get to her husband.

THE COURT: I don't know. Is he [the husband] a target; do you know, Mr. Purdy, at this time?

MR. PURDY: I would say yes, Your Honor . . .

THE COURT: Then I will sustain Mr. Scutti's position. What do you want her testimony for?

MR. PURDY: Against [third party], Your Honor. We want to present an indictment which is already drafted to the grand jury impanelled January 28, 1981, naming [third party] in that conspiracy that [the witness spouse] pleaded guilty to.

THE COURT: What if the target surfaces in some other grand jury testimony offered by you in this testimony against him?

MR. PURDY: Your Honor, we have presented the affidavit saying we will not use what she says or use the fruits of what she says against her husband in any proceeding. We are following the dictates of the Third Circuit in Malfitano and their reliance on Snoonian. We have met the requirements, we submit, and we do not have to say that he will not be a target.

* * *

THE COURT: Let me ask one thing, Mr. Purdy: Is [the husband's] status as a target in any way connected or affiliated with [fourth party] or [fifth party] or [third party]?

MR. SCUTTI: Sir, it is the same investigation.

* * *

MR. PURDY: But in the event that [third party] would cooperate and we could obtain [third party's] testimony against [the husband], which we submit is legitimate, given that we had his name before we had any information about tapes or spouses or whatever, and if you listen—if I may make—

sense diminished because the impact of the spouse's testimony is delayed. Therefore, if the integrity of the privilege is to be maintained, a wife who asserts the privilege should not be compelled to testify before a grand jury when her spouse is a target of the same underlying investigation as the party against whom she is called to testify and her testimony is sought with the expectation that it may lead to his indictment by a subsequent grand jury.

In *Malfitano*, we suggested that the Government might have avoided the effect of the privilege by severing the husband's indictment from that of the other defendants "to ensure that the grand jury does not use appellant's testimony against her husband." 633 F.2d at 279. We now conclude that having the Government simply forswear bringing an indictment against the nonwitness spouse before the *same* grand jury before which the witness spouse testifies does not adequately "protect the spouse from the effect of the testimony." 633 F.2d at 280 n.6. [11] To permit the Government to effectuate its prom-

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THE COURT: Just go on, yes. Then, you would—?

MR. PURDY: Then we would hope to use [third party's] and [fifth party's] testimony against—

THE COURT:—[The husband?]

MR. PURDY:—[The husband.]

* * *

Transcript of Hearing before Hon. Louis C. Bechtle, February 11, 1981, at 71-74, *quoted in* In re Grand Jury, No. 80-121-4, slip op. at 2-4 (E.D. Pa. Feb. 13, 1981).

[11] The dissent argues that our decision represents an unjustifiable expansion of *Trammel*. We disagree for several reasons. First, although *Trammel* traced the antipathy with which the privilege has been treated by commentators, the court nonetheless "declined to abandon completely the privilege. . . ." *Dissenting opinion, typescript at* 3. Second, in *Malfitano* this court plainly indicated that the privilege against adverse spousal testimony remains a forceful one in this circuit. Third, we note that we take as guidance for the scope of

ise, made under the constraint of our decision in *Malfitano*, that nothing said by the witness spouse will be used, either directly or indirectly, against her husband, by the mere expedient of not indicting the nonwitness spouse before the same grand jury "transforms that sworn promise into a worthless opinion." *In re Grand Jury*, No. 80-121-4, slip op. at 7 (E.D. Pa. Feb. 13, 1981).

The continued recognition of the privilege against adverse spousal testimony is not without its costs. It may result in probative evidence of guilt being withheld from the grand jury or at trial. If the testimony of a witness spouse who invokes the

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our authority in this case Fed.R.Evid. 501, which directs us to apply the exception "in the light of reason and experience." We believe that our decision properly executes that directive.

We also must disagree with the dissent's attempt to distinguish this case on the ground that the link between the wife's testimony and her husband's future indictment is too speculative and therefore does not threaten to " 'tear asunder' the marital union." *Dissenting opinion, typescript at* 5. Although we agree that in certain circumstances the link between one spouse's testimony and its potential adverse impact on the other spouse may be too attenuated to warrant invocation of the privilege, we do not believe this to be such a case. As noted above, all who are party to the action understand that the wife's testimony is sought, inter alia, in the hope that her husband will be indicted. Her testimony is thus, in our opinion, sufficiently adverse to her husband's interest for her to be able to invoke the privilege.

Finally, we do not believe that the simple expedient of bringing the husband's indictment before a separate grand jury adequately respects the privilege. Although, as the district court points out, the privilege could not be invoked at common law when the testimony was "not used in the proceeding in which the non-witness spouse [was] a party," *dissenting opinion, typescript at* 5, we do not believe that the Government should be permitted to bootstrap into two proceedings a prosecution based on a single common scheme for the sole purpose of circumventing the privilege. It would be anomalous to permit the Government to do indirectly what it is forbidden to do directly.

privilege is the only evidence of guilt against the other spouse, the latter cannot be convicted. Thus, the possibility that a criminal may not be convicted for the commission of a crime because of the privilege is the price which the judicial system accepts in order to further the societal goal of preserving marital harmony. But this feature of the privilege was carefully considered by the Court in *Trammel* and this court in *Malfitano*.

Accordingly, the order of the district court will be affirmed. [12]

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[12] The author of this opinion is somewhat troubled with our categorical enforcement of the privilege against adverse spousal testimony, which thereby protects a third party who has no entitlement whatsoever to the benefits of the privilege. I believe that the district court can respect the witness' privilege against adverse spousal testimony without also interfering with the Government's attempted prosecution of the third party, about whose activity the wife is being asked to testify. Writing in concurrence in *Malfitano*, Judge Gibbons recognized that the district court has the inherent authority to confer use-fruits immunity on the witness' spouse. *In re Grand Jury (Malfitano)*, *supra*, 633 F.2d at 281. In other words, the court has the power to order that neither the witness' testimony, nor the fruits thereof, can be used in any subsequent prosecution against her husband. Once the wife's testimony is immunized, the Government bears the burden in any subsequent prosecution of establishing that the evidence it proposes to use against the husband is derived from a legitimate source wholly independent of his wife's testimony. *See generally Kastigar* v. *United States*, 406 U.S. 441, 460 (1972) (discussing the scope of use-fruits immunity, also referred to as use and derivative use immunity, under 18 U.S.C. § 6002). The wife's testimony can then be compelled without abrogating the privilege. *Cf. United States* v. *Doe*, 478 F.2d 194, 195 (1st Cir. 1973) (where both spouses are granted immunity they can no longer invoke the privilege against adverse spousal testimony).

This court has already recognized that the district court has the inherent power to grant use-fruits immunity to a witness for the purpose of obtaining testimony favorable to the defense which is otherwise unavailable because the witness has invoked the privilege

SLOVITER, *Circuit Judge*, concurring in all except footnote 12.

I concur in all of Judge Rosenn's opinion except for footnote 12. I write separately only because of the inclusion of that footnote.

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against self-incrimination. *In re Grand Jury (Malfitano)*, *supra*, 633 F.2d at 281; *see Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 970-74 (3d Cir. 1980); *United States* v. *Herman*, 509 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). The district court should therefore have no less inherent power to confer use-fruits immunity to permit testimony otherwise unavailable by virtue of the assertion of the privilege against adverse spousal testimony. 633 F.2d at 281 (Gibbons, J., concurring). *Smith* and *Herman* recognized that a federal court has the inherent authority to fashion "a new remedy to protect an established right." *Government of the Virgin Islands* v. *Smith*, 615 F.2d at 971; *see United States* v. *Herman*, 509 F.2d at 1204. Devising a mechanism to protect the privilege against adverse spousal testimony, with its roots in the common law, is particularly suited to judicial action. Moreover, court conferred immunity based on the privilege against adverse spousal testimony does not run afoul of the basic problem raised by *Smith* of judicial usurpation of the prosecutorial decision whether to grant immunity to one person in order to obtain evidence against another. Although the immunity fashioned here is judicially created, it is the Government which ultimately can decide whether the risk of immunizing the husband from prosecution outweighs its desire to obtain evidence from the wife against the third party. The district court would decide whether a certain line of questioning will produce answers sufficiently adverse to the nonwitness spouse to justify application of the privilege. If the court concludes that the testimony is entitled to the protection of the privilege, the Government would then decide whether, and to what extent, to question the witness spouse. Thus, the important due process considerations which were necessary to justify intervention in the prosecutorial function in *Smith* need not be present to justify judicial action here.

The district court should therefore have the authority to hold a hearing to determine whether or not a claim of the privilege is *bona fide*. If, as in this case, the Government concedes that the nonwitness

I believe the issue of court awarded use-fruits immunity should not be reached in this case because no party requested the district court to award such immunity, nor did either party in its appellate brief or argument address the issue of whether the district court has such power or whether its use would be

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spouse is a target of the investigation, or if the witness otherwise meets the burden of establishing that the other spouse may be adversely implicated by the required testimony, the district court can indicate to the prosecution that if it desires the witness' testimony, then the court will confer on the nonwitness spouse use-fruits immunity and thereby protect that spouse from the testimony of the family counterpart. Of course, any subsequent indictment of the nonwitness spouse must be brought, under *Malfitano*, before a separate grand jury.

Although the concurrence objects to the inclusion of the foregoing observations as advisory, the law is to the contrary. An advisory opinion is a gratuitous expression of legal opinion by a court lacking either jurisdiction or a justiciable controversy before it. *See* Weinstein, *Rendering Advisory Opinions—Do We, Should We?*, 54 Judicature 140 (1970), *reprinted in* R. Leflar, Appellate Judicial Opinions 63 (1974). To avoid being merely advisory, a court's judgment must resolve " 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, *as distinguished from an opinion advising what the law would be on a hypothetical state of facts.*' " *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (emphasis added) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)).

I make three observations. First, this note expresses a personal comment only, as does the concurrence, and is not a judgment of the court. Second, the footnote is not an abstract statement, cut off from a live controversy, of what the law should be. We are confronted with just such a controversy and must resolve a difficult question concerning the proper scope of the privilege against adverse spousal testimony. Finally, the issue of whether the scope of the privilege should be coextensive with use and derivative use immunity, thus requiring a *Kastigar*-type hearing before evidence against the husband can be introduced in any subsequent prosecution of him, was raised by the Government in its brief to us.

appropriate in the circumstances before us. [1] Indeed, as Judge Rosenn points out in his opinion, the government retreated in the trial court from its apparent willingness to promise use-fruits immunity, and promised only not to use the wife's testimony directly against the husband. Typescript op. at 3. The government continues to adhere to this position on appeal. The only issue considered by the district court and the parties was the scope of the marital privilege.

In this posture of the case, I believe any suggestion that the district court might have inherent power to award use-fruits immunity to override the marital privilege is akin to an advisory opinion, and suffers from the objections which have been recognized as attending advisory opinions. *See, e.g., United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961). Also, neither the government nor the counsel for the witness have been heard on the practical problems which the court's assumption of such power might present. Thus, I see no good reason to reach to address a difficult legal issue in a vacuum, particularly when the conclusion is, at least for me, far from clear.

The legal difficulties with the course which Judge Rosenn suggests are formidable. Congress has provided for a grant of immunity when a witness invokes his or her privilege against compulsory self-incrimination. 18 U.S.C. §§ 6001-05. It has made no comparable provision when a witness invokes one of the other testimonial privileges protected under Federal Rule of Evidence 501. We do not know whether the omission was deliberate. It might be possible to argue that some of the common law privileges protected by that Rule are designed to protect against disclosure itself rather than use. Many of the

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[1] The only reference at all by the government in its appellate brief to any hearing is in its suggestion that "the factual questions regarding the applicability of the marital privilege" could be decided at a *Kastigar* hearing at which the court could determine if the information used to indict the non-witness spouse was tainted. Government Brief at 15. This is on its face not the issue referred to in the text above, or in Judge Rosenn's footnote 12.

common law privileges, such as the doctor-patient, attorney-client, and priest-penitant privileges, are designed to protect the relationship from the mistrust and lack of candor which might follow were disclosure of confidential communications compelled. *See Trammel* v. *United States*, 445 U.S. 40, 51 (1980). If so, use-fruits immunity would not adequately substitute for the compulsion of disclosure. One could debate whether the marital privilege stands in the same class as the above-mentioned privileges. In *United States* v. *Doe*, 478 F.2d 194 (1st Cir. 1973) the court held that the government's agreement not to prosecute the non-witness spouse satisfied the purpose of the privilege, but in that case the government itself granted transactional immunity and the court merely ordered the witness spouse to testify. In *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974), the government had agreed to provide use-fruits immunity to the spouse and had also advised the court that the non-witness spouse was not a target, causing the court to denominate the threat to the spouse as "speculative". The situation here is not analogous, since the government has conceded that the husband is in fact a target.

Since the government is unwilling to grant either transactional immunity or the lesser use-fruits immunity in this case, I am concerned that Judge Rosenn's suggestion may be construed as an invitation for the courts to intrude into an area which should be more appropriately left to prosecutorial discretion. A decision as to whom to immunize in order to elicit testimony inculpatory of another has traditionally been considered part of the prosecutorial, not judicial, function.

I share Judge Adams' view that the decisions of this court in *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980), and *United States* v. *Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979), where we affirmed the inherent power of the court to immunize a witness whose testimony is essential to an effective defense, stemmed from the need to protect the due process rights of a defendant. No comparable right is suggested in this case or in this situation. Instead this case merely illustrates the dilemma which the prosecutor often faces in selecting which defendant to

prosecute when, for reasons of public policy, certain testimony is shielded by a privilege.

I do not suggest that a court has no inherent power to grant immunity in appropriate circumstances, nor am I willing at this time to hold that it does. It is possible that it would be more appropriate to wait for Congress to decide that the same strong public interest which impelled it to provide for statutory immunity when testimony is needed of a witness who claims the Fifth Amendment privilege warrants a similar statute when a witness claims marital privilege. There may be compelling arguments which would persuade us that it is appropriate for the court to act even in the absence of such a statute. If so, they can await resolution until the appropriate case.

ADAMS, J., dissenting.

The majority today holds that the marital privilege may be invoked to foreclose testimony by a grand jury witness against a third-party who might implicate the witness's spouse before another grand jury which has not as yet been authorized. Because I believe that such a holding unduly extends the marital privilege and contravenes the dictates of the Supreme Court's recent decision in *Trammel* v. *United States*, 445 U.S. 40 (1980), I respectfully dissent.

I.

As Professor Wigmore noted, the origin of the privilege against adverse spousal testimony is shrouded in "tantalizing obscurity." 8 J. Wigmore, Evidence § 2227, at 211 (McNaughton rev. 1961). [1] Emerging late in the sixteenth century, the privilege is linked historically—if not logically—to the now

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[1] For additional discussion of the history of the privilege, see, *e.g.*, Haney, *The Evolutionary Development of Marital Privileges in Federal Criminal Trials*, 6 Nat'l J. Crim. Def. 99 (1980); Comment, *The Spousal Testimonial Privilege After* Trammel v. United States, 58 Den. L.J. 357 (1981); Note, 11 Seton Hall L. Rev. 265 (1980).

universally rejected rule of spousal incompetency, which disqualified one spouse from testifying on behalf of the other. Both rules have been attributed, at least in part, to the "semi-medieval metaphysic[al]" notion that the partners to a marriage are not distinct individuals but a unified whole—"duae animae in carne una" ("two souls in one flesh"). 2 J. Wigmore, Evidence § 601, at 857 (Chadbourn rev. 1979) (quoting E. Coke, Commentarie Upon Littleton, 6b (1628)). Thus, because the defendant was incompetent as a witness, his spouse was similarly precluded from testifying for or against him.

Moreover, maintenance of the fundamental unity of the married couple demanded legal solicitude for domestic harmony, "the peace of families":

> [W]hen the common law says that a man and his wife are one, or, in Lord Coke's language: "As two souls in one person"—it is said no man shall put asunder those who are thus joined together, and, least of all, in the name of law, shall the administration of justice pull and tear asunder this conjugal relation by the step of the sheriff or the precept of the judge that compels one to come and betray the other.

8 J. Wigmore, *supra* § 2228, at 215 (quoting Abbott, 2 *The Trial of Henry Ward Beecher [Tilton* v. *Beecher*, City Ct. of Brooklyn, N.Y.] 49-50 (1875)).

Early American jurisprudence embraced without question the "general rule that neither a husband nor wife can be a witness for or against the other." *Stein* v. *Bowman*, 38 U.S. 184, 195, 13 Pet. 209, 221 (1839). Subsequent rulings, however, have modified considerably the scope of the marital privilege. By the middle of the nineteenth century, the spousal incompetency rule was abolished or restricted by most states and replaced with a statutory privilege protecting confidential communications between the spouses. 8 J. Wigmore, *supra* § 2333, at 645. Years later, the United States Supreme Court followed suit, holding that the wife of a criminal defendant was a competent witness in his behalf, *Funk* v. *United States*, 290 U.S. 371 (1933), but that confidential communications between husband and wife were privileged, *Wolfe* v. *United States*, 291 U.S. 7 (1934).

In 1958, the Supreme Court, pointing to the "persistent instincts of several centuries," upheld the rule that permitted a defendant to exclude the adverse testimony of his spouse. *Hawkins* v. *United States*, 358 U.S. 74, 79 (1958). But in 1980, "reason and experience" convinced the Supreme Court to overrule *Hawkins*. *Trammel* v. *United States*, 445 U.S. 40 (1980). The Court acknowledged the criticism to which the marital privilege had been subjected, [2] and was particularly impressed by the fact that, in the years since *Hawkins*, seven states had abolished the privilege of an accused to exclude adverse spousal testimony. *Trammel*, 445 U.S. at 48-49. Nonetheless, it declined to abandon completely the privilege against adverse spousal testimony. Instead, the Court limited the rule to protect only the right of the *witness* spouse to refuse to testify adversely against the husband or wife. The Court reasoned that if one spouse were willing voluntarily to testify against the other, little of value remained of the marital relationship. Thus, the modern justification for the rule—"fostering the harmony and sanctity of the marriage relationship"—would not be served if the defendant could prevent his otherwise willing spouse to testify against him. *Id.* at 44.

A careful reading of the Supreme Court's opinion in *Trammel* reveals the discomfort with which the privilege against adverse spousal testimony has been viewed. The Court explicitly stated that the privilege "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Trammel*, 445 U.S. at 50 (quoting *Elkins* v. *United States*, 364 U.S. 206,

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[2] Specifically, the Court pointed to Wigmore's comment that the privilege was "the merest anachronism in legal theory and an indefensible obstruction to truth in practice." *Trammel*, 445 U.S. at 45 (quoting 8 Wigmore, *supra* § 2228, at 221). It also noted efforts by the American Bar Association, the American Law Institute, and others to abolish or restrict the rule. *Id.*

234 (1960) (Frankfurter, J., dissenting)). And while the Court found it unnecessary to discard the privilege altogether, the factual context of the *Trammel* case provided the Court with an opportunity to reiterate its "historical antipathy" toward the privilege and, once again, to constrict is applicability in the federal courts. *See* Haney, *supra* note 1, at 157-58. In the face of this precedent, it would appear difficult to justify any expansion in the scope of the rule. Yet, the majority has done precisely that in the present situation.

II.

The majority would permit the invocation of the marital privilege in this case because "[t]he potential disruption to marital harmony is in no sense diminished because the impact of the spouse's testimony is delayed," Typescript op. at 9, and "[i]t would be anomalous to permit the Government to do indirectly what it is forbidden to do directly." Typescript op. at 10, n. 11. I disagree with both the factual and the legal premises of this conclusion. While indirect use of the witness spouse's testimony conceivably may cause stress in the marital relationship, there is, in my view, a qualitative difference in impact between testimony that itself causes a grand jury to indict the non-witness spouse, and testimony against a third party, who eventually *may* testify against the spouse before another grand jury. Only in the former situation does one spouse actually speak the words that condemn the other. Surely, it is this direct use of adverse testimony—not the speculative and attenuated connection between testimony and indictment that is at issue in this case—to which Wigmore referred when he spoke of the "*natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life partner." 8 J. Wigmore, *supra* § 2228, at 217 (emphasis in original).

Put simply, the privilege against adverse spousal testimony was never meant to bar absolutely all testimony that, in some way, affected the relationship between the marital partners. Rather, the privilege—as defined and limited throughout the

centuries—reflects the irreconcilable tension between the "right to every man's evidence" and society's interest in excluding adverse testimony by one spouse against the other. *Trammel*, 445 U.S. at 50-51. When the risk is high that the testimony will "tear asunder" the marital union, the societal interest in domestic harmony prevails and the courts may exclude such otherwise relevant evidence. When, in contrast, the danger to the family is merely speculative, the balance favors the admission of the testimony. Only in this way can the lower courts heed the admonition of the Supreme Court in *Trammel* that the privilege "be strictly construed and accepted." 445 U.S. at 50.

Sensitive to this balance, the courts historically have drawn fine, but necessary, distinctions in their analyses of the marital privilege. Specifically, as the majority concedes, Typescript op. at 5, the courts have carefully limited the applicability of the marital privilege only to adverse spousal testimony used in the very proceeding at which the non-witness spouse is indicted or tried. The privilege cannot be invoked when the testimony is elicited in another, separate proceeding and is not used in the proceeding in which the non-witness spouse is a party. [3] *See, e.g.*, *United States* v. *Burks*, 470 F.2d 432, 435-36 & n.6 (D.C. Cir. 1972) (privilege not applicable because husband's legal interests were "in no way at stake in this case");

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[3] The marital privilege thus should be distinguished from the fifth amendment privilege against self-incrimination. The latter privilege is constitutional in nature and extends to any testimony that might tend to incriminate the witness. *See Kastigar* v. *United States*, 406 U.S. 441, 444-45 (1972); *Hoffman* v. *United States*, 341 U.S. 479, 486-87 (1951). The marital privilege, in contrast, "has not ordinarily been construed to allow one spouse to decline to testify merely because the testimony may incriminate [*sic*] the other." *In re Snoonian*, 502 F.2d 110, 112 (1st Cir. 1974). At least one court of appeals explicitly had held that the scope of protection afforded by the marital privilege is not coextensive with that of the fifth amendment. *In re Grand Jury Proceedings (Hermann)*, Nos. 81-5602, 81-5636, slip op. at 13834 (5th Cir., Nov. 10, 1981).

United States v. *Fields*, 458 F.2d 1194, 1199 (3d Cir. 1972) (testimony of spouse of one defendant sought by co-defendant; proper procedure is to grant severance and then permit the witness to testify for the codefendant), *cert. denied*, 412 U.S. 927 (1973); 8 J. Wigmore, *supra* § 2234, at 231. [4]

In *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980), for instance, the appellant was subpoenaed to appear before a grand jury investigating the alleged illegal acts of her husband. She refused to answer, citing her marital privilege, and was held in contempt. This Court reversed. Stating that "[t]he main rationale for the privilege today is that it protects the marriage from the discord that occurs when one spouse testifies against the other," 633 F.2d at 277, we rejected the Government's contention that the rationale of the privilege would not be served when, as here, the two spouses were "partners in crime." The fact that the grand jury *before which the appellant was called* could indict the non-witness spouse was of a paramount importance to the Court:

> [T]he district court seemed to think that because the government has promised not to use appellant's testimony in future proceedings against her husband the appellant has no reason to invoke the privilege. Even if the appellant's testimony is not used in later proceedings, it seems *there is nothing to prevent this grand jury from considering the appellant's testimony in deciding whether to indict. There is no indication that the government intends to*

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[4] Wigmore pointed out the seeming illogic of this limitation, noting that "[i]f the fear of causing marital dissension or disturbing the domestic peace were genuinely the ground of the privilege . . . then the privilege should apply to testimony which in any way *disparages* or disfavors the other spouse, irrespective of his being a party to the cause. . . ." 8 J. Wigmore, *supra* § 2234, at 230-31. Wigmore nonetheless expressed no regrets that the privilege had by definition been "restricted to such testimony only as disfavors the other spouse's *legal interests in the very case* in which the testimony is offered" and thus "was wholesomely kept within some sort of bounds." *Id.* (emphasis in original).

> *somehow sever the husband's indictment from that of the other defendants to ensure that the grand jury does not use appellant's testimony against her husband.*
>
> * * *
>
> *The fact that the grand jury will consider appellant's testimony and possibly indict her husband on the basis of it will put a strain on their marriage.* The husband will be subjected to a trial due to an indictment based in part on appellant's testimony. This is no less of a strain on the marriage than if the appellant testified at his trial.

633 F.2d at 279-80 (footnote and citations omitted). [5]

The *Malfitano* court distinguished *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974), in which "it was clear that the grand jury *before which the husband would testify* would not use his testimony to indict his spouse." *Malfitano*, 633 F.2d at 280 (emphasis added). In *Snoonian*, Garry Snoonian refused to testify before the grand jury on the basis of the marital privilege. The Government subsequently filed an affidavit stating that "no testimony of Gary Snoonian before the Grand Jury, or its fruits, will be used in any way in any proceeding against his wife." 502 F.2d at 112. The grand jury was investigating extortionate extensions of credit; the purported danger to the wife came solely because she had executed a joint tax return and because her husband's testimony might lead to a charge of fraud. The First Circuit held that the marital privilege did not apply: "the speculative nature of the threat to the wife, coupled with the Government's unequivocal and convincing promises not to use any of the testimony against her, nullifies any claim of privilege. . . ." 502 F.2d at 113.

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[5] The majority's conclusion that the testimony in question here amounts to testimony "against . . . her spouse in a criminal proceeding," Typescript op. at 7 (quoting *Malfitano*, 633 F.2d at 277), is somewhat perplexing. *Malfitano* clearly reflected the common law conception of the marital privilege, limiting its applicability to adverse testimony that could be heard, *and used*, by the grand jury that indicted the non-witness spouse.

In the present case, the Government has promised that it "will not present to the Grand Jury empaneled January 28, 1981 an indictment in which [the witness's] spouse, . . . is named as a defendant or as an unindicted co-conspirator." Appendix at 32a. Thus, while the husband may be a "target" of the Government's narcotics probe, he is not a target of *this particular grand jury's* investigation. He may never be indicted, and he most certainly will not be indicted by the grand jury that heard and considered his wife's testimony. Whatever link might exist between the witness's testimony and the eventual indictment of her husband, if such comes about, is attenuated at best. Nor has there been any claim of confidential communications between the spouses. Under these circumstances, the attempt by the Court here to disregard *Malfitano* and extend the privilege beyond its traditional boundaries is both improvident and unnecessary. As succinctly stated by Wigmore, "no court ought today to lend its sanction to any expansion of the limits of this undesirable rule of privilege, and there is at least ample authority for the most rigid restriction." 8 J. Wigmore, *supra* § 2235, at 234.[6]

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[6] *See also* McCormick's Evidence § 79, at 165 (2d ed. 172). ("[P]rivileges . . . are inept and clumsy devices to promote the policies they profess to serve, but are extremely effective as stumbling blocks to obstruct the attainment of justice. Accordingly the movement should be toward restriction, and not toward expansion, of these mechanisms for concealment of relevant facts.").

I would reverse the order of the district court and hold that the privilege against adverse spousal testimony does not extend to the proceeding at hand. [7]

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[7] Because I conclude that the privilege should not apply here, I find it unnecessary to discuss the propriety of Judge Rosenn's suggestion that the district court confer use-fruits immunity on the non-witness spouse. I am constrained to note, however, that there is considerable doubt whether the judicial branch has authority, especially in a nonconstitutional case, to order that immunity be conferred. Both *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980) and *United States* v. *Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979), involved due process considerations not present in the case before us today. *See also United States* v. *Rocco*, 587 F.2d 144, 147 (3d Cir. 1978), *cert. denied*, 440 U.S. 972 (1979).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-1402

In re

GRAND JURY MATTER
UNITED STATES OF AMERICA,

Appellant

(D.C. Grand Jury No. 80-0121-4)
ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, ROSENN and SLOVITER, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on October 29, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed February 13, 1981, be, and the same is hereby affirmed.

ATTEST:

SALLY MIVOS
Clerk

MARCH 9, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-1402

In re

GRAND JURY MATTER
UNITED STATES OF AMERICA,

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ROSENN, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by Appellant, UNITED STATES OF AMERICA, in the above titled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Adams, Judge Hunter and Judge Garth would grant the petition for rehearing, for they believe that the questions presented are of such importance as to require consideration by the full court.

By the Court,

/s/ Dolores K. Sloviter
DOLORES K. SLOVITER
Circuit Judge

Dated: May 4, 1982

APPENDIX D

In The

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

G. J. 80-121-4

In re

GRAND JURY MATTER

MEMORANDUM AND ORDER

BECHTLE, J. FEBRUARY 12, 1981

Presently before the Court is a matter concerning the investigation by a federal grand jury of [Richard Roe] involving alleged illegal transactions in methamphetamine. The Government is presently before the Court seeking to compel the testimony of [Jane Doe] before that investigating grand jury which was empaneled within this district on January 28, 1981. [Jane Doe,] who has been previously immunized under 18 U.S.C. § 6002, has refused to answer certain proposed questions of the Government, as contained in the Government's Motion to Compel Testimony at Ex. B (Questions 1-34). She has asserted that the answering of those questions conflicts with the marital privilege against a spouse testifying in a grand jury proceeding about matters which would "implicate" the other spouse. *See In re Grand Jury (Malfitano)*, 633 F.2d 276, 277 (3d Cir. 1980) (Seitz, C.J.) The purpose behind that privilege is that it serves to "protect the marriage from the discord that occurs when one spouse testifies against the other." *Malfitano, supra*, at 277.

In response to the witness' invoking of the marital privilege, the Government has submitted to the Court two separate affidavits, under oath, signed by the Assistant United States Attorney in this case. They were filed in reliance upon the case

of *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974). There, the court held that:

> We need not, however, determine the precise contours of the husband-wife privilege. The Government has not only stated that the wife is not a "target" but, more tangibly, it has executed and filed in court an affidavit that nothing said by the husband, and no fruits thereof, will be used against her. We think this effectively removes the wife from any category which can remotely be likened to a "party" to the grand jury proceedings. Under F.R.Crim.P. 7(c) no indictment could be returned by the grand jury without the Government's signature. Were the Government to renege on its sworn promise, it is hard to conceive of a court failing to find an estoppel. *Cf.* Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Commonwealth v. Benton, 356 Mass. 447, 252 N.E.2d 891 (1969). . . .

110 F.2d at 112.

The inherent difficulties in the *Snoonian* approach in attempting to protect the marital privilege have been all too clearly indicated in this very proceeding. At the hearing before this Court on February 11, 1981, the Court inquired of the Assistant United States Attorney as follows:

THE COURT: I don't know. Is he a target; do you know, Mr. Purdy, at this time?

MR. PURDY: I would say yes, Your Honor, I would say.

THE COURT: Then I will sustain Mr. Scutti's position. What do you want her testimony for?

MR. PURDY: Against [Richard Roe,] Your Honor. We want to present an indictment which is already drafted to the grand jury impanelled January 28, 1981, naming [Richard Roe] in that conspiracy that [Jane Doe] pleaded guilty to.

THE COURT: What if the target surfaces in some other grand jury testimony offered by you in this testimony against him?

MR. PURDY: Your Honor, we have presented the affidavit saying we will not use what she says or use the fruits of what she says against her husband in any proceeding. We are following the dictates of the Third Circuit in Malfitano and their reliance on Snoonian. We have met the requirements, we submit, and we do not have to say that he will not be a target.

* * *

MR. SCUTTI: Judge, I have Malfitano right here—I have it in a slip opinion—and the word "target" very often in the opinion was an important factor in the case for both the concurring opinion and the prosecution. Now the Government is saying that this woman can go home, knowing that her husband is going off to get indicted, and somehow these parties in the marriage are going to figure out the nuances of the law.

I think they ought to just say he is not a target. If he is a target, then my position is totally different than it was, and I resort back—retreat to the position that no case in this circuit says that you do away with the privilege by filing an affidavit.

And by analogy, sir, as I point out in my brief—. . . we have had informal immunity around for many years in this circuit, and it has got an awful lot of respect and an awful lot of use, but I have never seen a prosecutor go to a federal judge and say, "We're going to give him informal immunity; order him to testify."

THE COURT: Let me ask one thing, Mr. Purdy: Is [Mr. Doe's] status as a target in any way connected or affiliated with [Smith] or [Jones] or [Roe]?

MR. SCUTTI: Sir, it is the same investigation.

MR. PURDY: Well, Your Honor, just as the Third Circuit discussed in Malfitano, we have a co-conspiracy here.

THE COURT: Right.

MR. PURDY: And it is—well, I can't say "our hope"—we are trying to do things one at a time—

THE COURT: Sure.

MR. PURDY: —to name [Richard Roe] in a conspiracy indictment.

THE COURT: Would that also include [Mr. Doe?]

MR. PURDY: No.

THE COURT: Oh.

MR. PURDY: But in the event that [Mr. Roe] would cooperate and we could obtain [Mr. Roe's] testimony against [John Doe,] which we submit is legitimate, given that we had his name before we had any information about tapes or spouses or whatever, and if you listen—if I may make—

THE COURT: Just go on, yes. Then, you would—?

MR. PURDY: Then we would hope to use [Mr. Roe's] and [Mr. Jones'] testimony against—

THE COURT:—[Mr. Doe?]

MR. PURDY:—[Mr. Doe.]

* * *

MR. SCUTTI: Sir, one last point: With all due respect, would you please reread this man's affidavit in light of what he just said? You don't have to do it now.

THE COURT: Well, I am reading them both together. The first one which was in January says they won't use it against him in any proceeding which means civil, criminal, administrative, anything else, ever—ever; right?

MR. PURDY: Right.

MR. SCUTTI: Now—

THE COURT: Wait a minute. Secondly, he assures in the other one that in this indictment in the grand jury now, [Mr. Doe] will not be a defendant, no matter who testifies against him.

MR. SCUTTI: Okay.

THE COURT: And that's that. But he is holding out the prospect that [Mr. Doe] may be a defendant in some other grand jury, but not this one impanelled on the 28th. That's what he is saying.

MR. SCUTTI: As a result of what [Mrs. Doe] says against some person who may then testify against—

THE COURT: That's what I have to decide.

MR. SCUTTI: Okay.

THE COURT: —what that means. Is that proper and is it like a proper prosecutorial track, nevertheless is so predictable that it offends the privilege as if [Doe] was to be a defendant in the 28th grand jury. In other words, I have to decide whether or not the likelihood of [Doe] being a defendant at a May or July proceeding is as bad as if you could be indicted today on the testimony. But they say they won't use the testimony in any proceedings, so that might be enough to save the day. I don't know.

The initial affidavit filed with this Court by the Government states:

> Donald A. Purdy, Jr., being duly sworn according to law, deposes and says as follows:
> The undersigned hereby certifies and attests that nothing said by Grand Jury Witness [Jane Doe] will be *used*, either directly *or indirectly*, against her husband, [John Doe,] in *any legal proceedings*.

(Emphasis supplied.)

Therefore, it is perfectly clear to the Court that the prosecutorial plan envisioned by the Government at present is that the testimony of [Jane Doe] before the grand jury will, in fact, be used *indirectly* to implicate her husband, [John Doe,] in criminal activity. This conclusion flows from the predictable scenario outlined by the Government that her grand jury testimony will be used initially against [Richard Roe,] whose anticipated testimony will, in turn, serve as the foundation to implicate [John Doe] in criminal acts, for purposes of another legal proceeding, flowing from the same drug-related events of which [Jane Doe] is to testify. The Government, as such, is admitting that [John Doe] is a *target* of a criminal investigation. Therefore, the holding in the case of *Malfitano*, *supra*, where the other spouse was also a target is applicable:

> Thus *In re Snoonian*, 502 F.2d 110 (1st Cir. 1974), relied on by the parties, is distinguishable. There, a husband was required to testify before a grand jury where the government promised that his testimony would not be used against his wife. In *Snoonian*, the witness' spouse was not a target, and the government expressly promised that "this Grand Jury has no intent to prosecute your wife on the basis of your testimony here." *Id.* at 111. Contrary to the present case, it was clear that the grand jury before which the husband would testify would not use his testimony to indict his spouse.

633 F.2d at 280. *See also* 633 F.2d 280, at n.6.

The only difference that exists in the present case from the *Malfitano* decision is that the testimony of the wife here will not directly implicate her husband before the same grand jury

before which she is testifying. Rather, it will indirectly implicate her husband in a future legal proceeding. As such, the effect is the same; the danger to the marital relationship is as manifest.

In essence, before the ink is dry on the Government's affidavit, it has by its own statements transformed that sworn promise into a worthless protection. It is reneging on its sworn promise by stating it will do, even before [Mrs. Doe] testifies, the very thing its affidavit said it would not do. *See Snoonian*, *supra*, at 112. That is, it will "indirectly" use the testimony of [Jane Doe] to "implicate" her husband in criminal activity for purposes of another "legal proceeding." A clearer case serving to seriously undermine the important purposes of the marital privilege would be hard to imagine.

An appropriate Order will be entered.

In The

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

G. J. 80-121-4

In re

GRAND JURY MATTER

ORDER

AND NOW, TO WIT, this 12th day of February, 1981, IT IS ORDERED that the Government's motion to compel testimony of [Jane Doe] is hereby *denied*, and the witness shall not be compelled to answer before the grand jury questions 1-44 set forth in Ex. B of the Government's motion.

/s/ Louis C. Bechtle
LOUIS C. BECHTLE, J.

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ALEXANDER L. STEVAS,
CLERK

No. 82-183

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA

v.

JANE DOE,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where testimony implicating a target is compelled from his spouse before a grand jury to corroborate evidence against a third party, solely to gain in some future proceeding that party's testimony against the target, may the witness-spouse invoke the privilege against adverse spousal testimony.

2. Whether the privilege against adverse spousal testimony should extend to testimony suggesting joint criminal activity of the spouses.

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STATEMENT

The government seeks review of a judgment of the court of appeals which sustained an order of the district court allowing respondent, a witness, to invoke the privilege against adverse spousal testimony as a bar to answering questions before a grand jury. The questions were drafted not to name directly respondent's spouse, creating the appearance of an inquiry concerning a third party (see C.A. App. 23a-26a). However, before the questions were proposed, the government possessed and knew the contents of a tape recorded conversation between respondent and the third party (see C.A. App. 50a-83a) which is replete with references directly adverse to respondent's spouse.[1]

Thus, respondent's claim of privilege is rooted in facts demonstrating that her answers to the questions would result in testimony directly adverse to her spouse. Leaving no doubt that this is so, it has been conceded (Pet. 3), that respondent's spouse was a target[2] of the very investigation in which her testimony was sought.

1. The statements preserved reveal grounds for commencing this investigation as well as the basis for invoking the privilege. Knowing the government possessed the recording and presumably aware of other information adverse to her spouse, respondent invoked the privilege when subpoenaed to appear before the grand jury (C.A. App. 4a). Prior to filing a motion to compel testimony, the government provided respondent with a copy of a transcript (C.A. App. 10a) showing the recording was transcribed on "2/28/80" (C.A. App. 50a), nearly one year before the hearing on the motion. When seen in light of the transcript, the proposed questions call for responses which directly implicate respondent's spouse.

Respondent's claim that many of the questions proposed were the product of an illegal interception of an oral communication was sustained by the district court. Because the government did not appeal that ruling, it has foregone the use of the tape recording as the best evidence to incriminate the third party whom it complains before this Court is the "unjustified windfall" beneficiary of the privilege relied on by respondent (Pet. 16).

2. The Department of Justice, providing uniform guidance to United States Attorneys, has defined the term "target" as "a person as to whom the prosecutor or the grand jury has substantial evi-

To respect the claim of privilege while seeking to compel respondent to answer the questions, the prosecutor filed an affidavit in the district court certifying that "nothing said by (respondent) will be used, either directly or indirectly, against her husband . . . in any legal proceedings." (C.A. App. 27a). This certification appeared to promise that the government would confer on the target spouse immunity coextensive with the statutory "use and derivative use" immunity which had earlier been conferred on respondent. 18 U.S.C. §6002; *Kastigar v. United States*, 406 U.S. 441 (1972).

Subsequently, retreating from its promise to insulate totally her spouse from direct or derivative incrimination by any statement of respondent, the government reduced its commitment to refrain merely from naming the target spouse in any indictment presented to the particular grand jury before which the investigation was then being conducted (C.A. App. 32a-33a).

Because respondent's spouse was a target of the same investigation in which her testimony was sought and because it was found respondent's testimony would implicate him, the court of appeals and the district court perceived the modified promise to be a deception designed solely to dispense with the invocation of the privilege.[3] Criticizing the affidavit as an improper device the court of appeals declared:

NOTE 2—*(Continued)*

dence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." United States Attorneys' Manual, Tit. 9, §11.250.

3. Stating that under such circumstances the danger to the marital relationship is manifest, the district court admonished:

> In essence, before the ink is dry on the Government's affidavit, it has by its own statements transformed that sworn promise into a worthless protection. It is reneging on its sworn promise by stating it will do, even before (respondent) testifies, the very thing its affidavit said it would not do. See *Snoonian*, *supra*, at 112. That is, it will "indirectly" use the testimony of (respondent) to "implicate" her husband in criminal activity for pur-

> (W)e do not believe that the simple expedient of bringing the husband's indictment before a separate grand jury adequately respects the privilege. (Pet. App. 10a n. 11).

Two statements of the prosecutor, one of record and the other made subsequent to the decisions below, support the holding of the court of appeals.

At the hearing before the district court, the prosecutor, in response to a question from the judge, "What do you want her testimony for?", answered:

> Against (third party), Your Honor. We want to present an indictment which is *already drafted* to the grand jury . . . naming (third party) in that conspiracy that (witness spouse) pleaded guilty to. (C.A. App. at 154a; emphasis added).[4]

Not until after the decision of the court of appeals, in an article critical of the court's decision, was a statement published by the prosecutor making it known that such evidence existed. The prosecutor wrote:

> (Respondent's) co-defendant has *previously implicated* (third party) but the government considers (respondent's) testimony against (third party) to be an essential condition precedent to presentment of an indictment against (third party) because it is the

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poses of another "legal proceeding." A clearer case serving to seriously undermine the important purposes of the marital privilege would be hard to imagine. (Pet. App. 32a).

4. The indictment against the third party, "already drafted" without testimony by respondent before the grand jury, suggests evidence supporting the charges was available, other than the tape recording on which the prosecutor conceded he did not rely to compel respondent's answers (C.A. App. 148a-151a).

If evidence existed independent of both the tape recording and respondent's testimony, the need to compel her answers, overriding a claim of privilege, would become unnecessary. More importantly, if the courts below had been informed of such evidence, the decisions made, finding the affidavit's promise to be an expedient, would have been supported by an additional vital fact.

> only known potential evidence which can *corroborate* the testimony of her co-defendant against (third party). Purdy, *The Marital Privilege: A Prosecutor's Perspective*, 18 Crim. L. Bull. 309, 314 (1982) (emphasis added).[5]

This disclosure dilutes the prosecutor's contention that respondent's privilege barred evidence vitally needed to indict the third party.[6]

Even without benefit of this disclosure, acknowledging that circumstances may warrant the link between one spouse's testimony and the potential adverse impact on the other may be too attenuated to permit invocation of the privilege, the court of appeals found the facts here not to present such a case. The court stated:

> (W)e do not believe that the Government should be permitted to bootstrap into two proceedings a prosecution based on a single common scheme *for the sole purpose of circumventing the privilege*. It would be anomalous to permit the Government to do indirectly what it is forbidden to do directly. (Pet. App. 10a n. 11; emphasis added).

In sum, the facts of this case show that government intended to circumvent the bar of the privilege by a contrivance to accomplish indirectly what it is prohibited clearly from accomplishing directly.

The government's suggestion of rehearing en banc, having been submitted to the judges who participated in the panel decision and to all other circuit judges of the Third Circuit in regular active service, eleven judges participating in all, was rejected, with three judges dissenting.

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5. Although the article disclaims that it reflects the legal position of the Department of Justice (*Id.* at 309 n. 1), factual statements bearing on the issue here should be noticed by this Court. Fed. R. Evid. 201.

6. Because the testimony of respondent would be merely corroborative, petitioner's claim that the holding below creates a significant obstacle to law enforcement (Pet. 7) is similarly eroded.

REASONS FOR DENYING THE WRIT

I. The court of appeals sustained respondent's claim of privilege in proper adherence to principles of law firmly established by decisions of this Court.

The decision of the court of appeals rests squarely within the rule of other decisions, each in proper adherence to a holding recently made by this Court. Respondent, satisfying the requirement that a witness may invoke the privilege, undisputedly claimed it in devotion to maintaining marital harmony. In circumstances where the government proposes to compel the testimony of respondent, merely to corroborate other evidence available against a third party, with the stated purpose to gain the cooperation of the third party against her spouse in some future proceeding, the government should be prevented from overriding the privilege. Under the facts of this case invocation of the privilege was not speculative or premature. The court of appeals, following the directive of Fed.R.Evid. 501, applied "reason and experience" in balancing the competing interests to determine whether the privilege should apply. Petitioner's suggestion that a procedure similar to that approved in *Kastigar v. United States*, 406 U.S. 441 (1972), should be adopted is in contravention of the approach ordained by Rule 501. Rather than allowing development of the law by courts applying "reason and experience", petitioner suggests a rule which would deny invocation of the privilege until one claiming it could satisfy a burden to show it has been already violated. In effect, petitioner advocates a procedure to replace that prescribed by Rule 501. The facts do not present an appropriate case for this Court to make a decision which would have application to the questions urged by petitioner. The first question presented was properly decided below and, in any event, would be better left to a case-by-case resolution than to a rule announced by this Court having general application to a

range of circumstances infrequently arising. As to the second question presented, petitioner advocates the creation of an exception to the privilege where spouses are joint participants in criminal activity. The facts here are incongruent to the question. Moreover, upon analysis this subject demonstrably would be better left for legislative determination than it is for decision by this Court.

1. In a recent decision redefining the scope of the privilege against adverse spousal testimony, this Court recognized justification for the privilege as "its perceived role in fostering the harmony and sanctity of the marital relationship." *Trammel v. United States*, 445 U.S. 40, 44 (1980). In limiting the invocation of the privilege to a claim by the witness-spouse, this Court observed that the privilege "furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."[7] *Id.* at 53.

In the present case, consistent with the holding in *Trammel*, respondent invoked the privilege as a witness after she was immunized pursuant to 18 U.S.C. §6002. Petitioner asks this Court to defeat the claim of privilege where the government seeks to use the fruits of respondent's testimony to indict her spouse who is the ultimate target of the very investigation in which her testimony is sought. Petitioner claims that the holding of the court of appeals contravenes the admonition of this Court in *Trammel*.

The court of appeals, acknowledging the holding in *Trammel*, recognized that the privilege has been sharply criticized (Pet. App. 5a-6a). Sensitive to such criticism, the court, in balancing considerations accorded to important interests underlying the privilege and those ascribed to law enforcement, determined that the government was attempting to accomplish indirectly what it may not accomplish directly. (Pet. App. 9a n. 11).

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7. The Court specifically refused to limit further the privilege as had been urged by a number of authorities. *Id.* at 48-50.

In deciding this case the court of appeals followed an earlier case in which it adhered to the holding in *Trammel*. The court observed that this Court had "decided that the privilege against adverse spousal testimony remains a viable principle of federal law and only modified the privilege by vesting it solely in the testifying spouse." *In Re Grand Jury (Malfitano)*, 633 F.2d 276, 277 (3d Cir. 1980). The court further noted, "the crux of (the) privilege is that a person may not be forced to be a witness against his or her spouse in a criminal proceeding." *Id.* at 277.

Central to the holding of the court of appeals is its observation, shared by the district court, that the government's "sole purpose" was to circumvent the privilege (Pet. App. 10a n. 11). The court determined that such a scheme violated an earlier precedent decided by it, thus making the comment that "the sole difference between the decisions is that here the Government seeks to accomplish indirectly what in *Malfitano* we prohibited it from doing directly." (Pet. App. 7a-8a). The disruption to marital harmony, however, would not be an indirect consequence of abrogating the privilege; rather, as the court stated, "the potential disruption to marital harmony is in no sense diminished because the impact of the spouse's testimony is delayed." (Pet. App. 8a-9a).

In sharp contrast to observations of the court of appeals and findings by the district court, petitioner contends that the decisions below held that respondent could invoke the privilege on the "sole ground that her testimony might incriminate a third party who in turn might incriminate respondent's spouse in some future proceeding." (Pet. 6).

Recognizing that this Court acknowledged recently the validity of the privilege, reaffirming important policy considerations, petitioner does not question the general availability of the privilege in a grand jury proceeding (Pet. 7). Rather, petitioner complains that the application of the privilege in this case expands its traditional

scope, prematurely frustrating the investigative function of the grand jury.

Claiming that an adverse effect on the target spouse is speculative, petitioner suggests respondent should be required to testify before the grand jury, on the condition that her spouse will not be indicted by that grand jury. Assuming it is practical that a claim of privilege could be deferred until such time as an adverse effect develops,[8] petitioner suggests a procedure followed in cases where a witness asserts the privilege against compelled self-incrimination after immunity has been conferred. See *Kastigar v. United States*, *supra*.

Petitioner overlooks important distinctions between this case and those following *Kastigar*. In such cases the witness receives a grant of immunity which is guaranteed broadly by statute. See 18 U.S.C. §6002; *Adams v. Maryland*, 347 U.S. 179 (1954); *Murphy v. Waterfront Comm.*, 378 U.S. 52 (1964). In this case the prosecutor provided an affidavit which is binding merely in the federal district over which the jurisdiction of his office extends.

Moreover, it is plain in circumstances of this case that the affidavit made a promise which was not coextensive with the privilege the government attempted to abrogate.[9] The procedure suggested would require the claim of privilege to await the indictment of the spouse, while it was known from the outset that the ultimate objective was to charge him through the device employed.

Petitioner's claim that the privilege is speculative is further contradicted by the facts. Previously it has been shown that the privilege was invoked where (a) answers to the questions proposed would implicate directly respondent's spouse; (b) even though the government af-

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8. The wisdom of allowing the time and expense of an investigation and indictment to be furnished before a claim of privilege may be heard is subject to serious question.

9. See *Kastigar*, *supra*, 406 U.S. at 459; *Zicarelli v. New Jersey State Comm. of Investigation*, 406 U.S. 472 (1972).

firmed it would not seek the indictment of her spouse by the grand jury before which respondent would testify, that promise was determined by the district court and the court of appeals to be a contrivance to circumvent the privilege; and (c) respondent's testimony is not vital to the investigation of criminal activities by the third party.[10]

Since the claim of privilege here was not speculative or premature, this case is inappropriate to apply the *Kastigar* procedure urged by petitioner.[11] Rather, this

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10. The availabilty of evidence otherwise directly implicating the third party has been shown, *supra* at 3-4. Further, the claim that the holding below results in "drastic consequences" (Pet. 7), depriving the grand jury of probative evidence, is diminished by the government's own failure to appeal a ruling of the district court barring use of the tape recording as the best evidence against the third party. Vital evidence is lacking perhaps because this case was viewed by the prosecutor in light of *Trammel* as seeming "to open the door for some government creativity in the face of assertions of the marital privilege." Purdy, *The Marital Privilege: A Prosecutor's Perspective*, *supra* at 311.

11. Petitioner cites *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972); and *United States v. Calandara*, 414 U.S. 338, 350 (1974), quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973) as warnings from this Court against obstacles that delay and impede the grand jury's investigation. The factual circumstances of those cases are distinguishable from the present case. In this case evidence other than that sought by overriding the privilege is available, permitting the grand jury to perform its assigned function. In each of the cases relied on by petitioner, evidence other than that which was claimed to be privileged appears not to have been available. Additionally, in *Branzburg*, the Court found that the privilege claimed should not cover the evidence in dispute. The facts of *Calandra* show that the evidence in dispute was in possession of the government before the privilege was asserted. In *Dionisio* the evidence compelled was found not to be protected by the privilege claimed. Moreover, in *Calandra*, this Court specifically stated: "Of course, the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *United States v. Calandra*, *supra*, 414 U.S. at 346 (footnote omitted). See Fed.R.Evid. 1101(c) and (d)(2).

case was properly decided by the court within the directive of Fed.R.Evid. 501 (see Pet. App. 9a-10a n. 11).[12]

2. As an independent basis for review, claiming "significant error" by the court of appeals (Pet. 16), petitioner contends that an exception to the privilege should be created by this Court. Noting that the Third Circuit's decision in this case conflicts with decisions of the Seventh Circuit and the Tenth Circuit,[13] petitioner contends that because this case suggests the spouses were joint participants in criminal activity, "reason and experience" dictate that society's interest in preserving marital harmony should be outweighed by its interest in law enforcement.

The purpose served by the privilege, having been stated so recently by this Court in *Trammel*, suggests that society's interest in fostering harmony in marriages, vital to the rehabilitation of a defendant spouse, would be well served by awaiting further decisions by the courts of appeals before determining what "reason and experience" dictate.[14]

Petitioner's argument, that the exception urged accords with exceptions to other privileges where the rela-

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12. Both the district court and a majority in the court of appeals found that the indictment of respondent's spouse was more imminent than speculative. Applying the test of "reason and experience", required by Rule 501, obviously may lead to differences of opinion as shown by the remarks of the dissenting judge in this case (Pet. App. 19a). See *Trammel v. United States*, *supra*, 445 U.S. at 53-54 (concurring opinion of Justice Stewart). Deference should be given to differences of opinion in applying the test prescribed by the rule. Such questions are resolved appropriately by allowing a case-by-case development of the law, unless it may be said that a decision is clearly erroneous.

13. *United States v. VanDrunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974), and *United States v. Trammel*, 583 F.2d 1166 (10th Cir. 1978), *aff'd on other grounds*, 455 U.S. 40 (1980).

14. Since the Court's decision in *Trammel v. United States*, *supra*, only the Third Circuit has addressed this question in *In Re Grand Jury (Malfitano)*, 633 F.2d 276 (3d Cir. 1980).

tionship shows abuse, is difficult to accept. Although it is well established that the attorney-client privilege does not shield a client who engages an attorney to obtain advice in the commission of a crime,[15] the distinctions between that privilege and the one between spouses are significant.

Any statement by an attorney resulting from an unlawful breach of the relationship would be limited to the occasion of the breach. The exception does not infringe on earlier untainted confidences between the parties nor obviously are confidences of other clients of the attorney affected. Although the exception would cause the attorney-client relationship to be severed, that relationship is one to which courts have accorded a need for confidentiality in communications not harmony between the parties. Between spouses, a breach of harmony in their relationship may have permanent adverse consequences affecting them and others in the family unit as well.

Petitioner's reliance on cases holding that the privilege protecting confidential communications between spouses does not apply to statements in furtherance of criminal activity, is misplaced. In both *United States v. Mendoza*, 574 F.2d 1373 (5th Cir. 1978) and *United States v. Kahn*, 471 F.2d 191 (7th Cir. 1972), the communications by or between husband and wife had been recorded by the government pursuant to court authorized interceptions. In each case the court was not confronted with the question whether to override the privilege in order to compel adverse testimony, since the statements were preserved in custody of the government. *Cf. United States v. Calandra, supra*, (evidence claimed to be seized in violation of Fourth Amendment, being already in government custody, permitted inquiry before a grand jury). The only question before the court was whether the communications were confidential or in furtherance of criminal activity. The distinction

15. *Clark v. United States*, 289 U.S. 1, 15 (1933).

beween compelling a witness to give testimony adverse to a spouse and circumstances in which the same is done freely but unwittingly, shows in the former the cause for a breach in marital harmony, whereas in the latter, pressure on the witness wholly is lacking.

Consequently, it is the element of coercion which causes the exception urged "to undermine the marriage precisely in the manner that the privilege is designed to prevent." *In Re Grand Jury (Malfitano), supra,* 633 F.2d at 279.

Furthermore, spouses may act as partners in crime in circumstances as varied as the offenses which are proscribed by federal enactment. If it is said that the privilege should be barred in a particular case, it should be shown that the rehabilitative values of maintaining harmony in the marital relationship are outweighed by the public interest in prosecuting the offense. The analysis is compounded if evidence is available other than that which must be compelled from a spouse.[16]

Therefore, an inquiry whether or when to measure law enforcement as outweighing marital harmony, requires an examination of a variety of social values in a manner more appropriate to legislative determination than to an issue which may be addressed uniformly by a decision of this Court.[17]

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16. Courts are ill suited to determine the social worth of marriages or whether particular marriages are deserving of the protection of the privilege. *Compare United States v. Brown,* 605 F.2d 389, 396 (8th Cir.) (marriage of short duration showing instability is undeserving of protection by the privilege), *cert. denied,* 444 U.S. 972 (1979), *with Ryan v. Commissioner of Internal Revenue,* 568 F.2d 531, 543 (7th Cir. 1977) (marriage of long duration showing such stability that protection of the privilege is unnecessary), *cert. denied,* 439 U.S. 820 (1978).

17. The provisions of Fed.R.Evid. 501 explicitly support this conclusion. The rule provides in pertinent part: "*Except as . . . provided by Act of Congress* . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (emphasis added).

Moreover, as petitioner concedes, because this case merely suggests that the spouses were joint participants in criminal activity (Pet. 16), it is inappropriate for resolving the question presented. When it is unclear whether answers to the questions proposed will reveal joint criminal activity, the question of which party should bear the burden of production arises. This question is left unresolved by petitioner. If the burden is on the witness to establish that the activity was not joint, it would be necessary to violate the privilege in order to assert it. Unless a court were to make the determination, *in camera*, an alternative unlikely to be welcome by the government, the remaining alternative is to put the burden on the prosecution to establish clearly that joint criminality is not merely suggested by the facts. In this case petitioner has made no such showing.[18]

An additional observation makes it surprising that petitioner advocates the exception. As proposed, the exception would confront a witness squarely with three choices: either to incriminate the spouse, or to give evasive or untruthful answers, or not to answer the questions and suffer contempt. It is clear that a spouse who claims the privilege is devoted to the marital relationship. Because devotion between spouses is often a matter of religious conviction, many would consider it a priority not to be abridged by the law. Accordingly, the exception advocated would invite for the prosecution coerced testimony which is at best seriously suspect. The undesirability of using such testimony in the administration of criminal justice seems obvious.

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18. Although it is clear that the answers proposed would implicate adversely the spouse of respondent, it is unclear whether this results from joint criminal activity or from respondent being merely a witness to acts or transactions in which her spouse participated.

II. Even if certiorari were otherwise appropriate, this case is inappropriate for resolution of the questions presented.

Petitioner claims this case presents important and recurring questions not to be regarded as an isolated instance. The assertion is unsupported by citation of any kind.[19]

In view of the paucity of cases dealing with the privilege since this Court decided *Trammel*, respondent suggests that questions concerning the application and scope of the privilege arise infrequently and are in a state of development among the circuits.[20] Thus, it seems appropriate to await further development of the law before the questions presented in this appeal are addressed.

The first question is not raised squarely by the facts of this case. The court of appeals exercised sound discretion in allowing the application of the privilege where it cited tactics by the government demonstrably lacking in good faith.[21] This view is supported considering the availability of other evidence making it unnecessary to override the privilege.

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19. Fed.R.Crim.Pro. 6(e)(2) mandates a rule of secrecy in grand jury proceedings, however allowing always an attorney for the government to be present. Accordingly, only the government could possess statistics which would show how frequently the privilege is invoked before grand juries. Research has disclosed no such record. It is clear that joint criminal activity between spouses creates a bar to testimony by a witness, not merely by invoking the privilege against adverse spousal testimony, but primarily by invocation of the privilege against self-incrimination. It is doubtful that cases frequently occur where, both spouses sharing criminal responsibility, the government would find it desirable to remove the Fifth Amendment bar by immunizing one spouse in order to gain reluctant testimony against the other. Without a grant of immunity the validity of subpoenaing such a witness is subject to serious scrutiny. *United States v. Mandujano*, 425 U.S. 564 (1976); United States Attorneys' Manual, Tit. 9, §11.251.

20. *United States v. VanDrunen*, *supra*, relied on by petitioner, was decided prior to this Court's decision in *Trammel*.

21. See, *Branzburg v. Hayes*, 408 U.S. at 707.

A previous decision of the court of appeals squarely raised the second question presented.[22] Petitioner cites this Court's grant of certiorari in *Trammel v. United States, supra,* as an indication that the Court might disagree with the court of appeals in this case, even though the question was raised not until the government's suggestion for rehearing en banc. In denying rehearing the court of appeals did not reach this question.[23] Moreover, the hearing in the district court (C.A. App. 85a-161a) shows no answer by respondent establishing clear facts of joint criminal activity, resulting in a record which only suggests a factual foundation for the second question. In view of a barren record supporting the issue, the question is not raised properly for this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

NICHOLAS J. NASTASI
Counsel for Respondent

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22. See *In Re Grand Jury (Malfitano), supra.*

23. In *Branzburg, supra,* this Court stated, "other issues were urged upon us, but since they were not passed upon by the Court of Appeals, we decline to address them in the first instance." 408 U.S. at 708.

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No. 82-183

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JANE DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent contends (Br. in Opp. 1) that her answers to the questions that the government wishes to address to her before the grand jury[1] "would result in testimony directly adverse to her spouse" and that her invocation of the privilege against adverse spousal testimony is justified for that reason. This claim, which is raised for the first time in this Court, is wholly without merit. The questions posed to respondent, which are reproduced in the Appendix, *infra*, 1a-4a, relate very specifically to the actions of respondent herself and two other individuals on particular dates. None of the questions refers to respondent's

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[1]For purposes of the district court hearing on respondent's claim of marital privilege and illegal interception of an oral communication, counsel stipulated that she would have refused to answer questions 2 through 44 of a prepared list of questions. See C.A. App. 9a, 23a-26a.

husband, and none calls for any mention of him. In fact, as respondent is aware, her husband was not even in the vicinity of the particular actions that are the subject of the questions.

Respondent points out (Br. in Opp. 1) that the contents of a tape recorded conversation between herself and the third-party target of the grand jury include references adverse to her spouse. That is true, but it is irrelevant to the questions raised in the petition. As respondent notes (*id.* at 1 n.1), the district court suppressed all questions relating to the tape recorded conversation on the independent ground that they were the product of an illegal interception of an oral communication (see C.A. App. 150a-151a), and that ruling was not challenged on our appeal. Thus, even if the government had planned to use the tape of the conversation against respondent's husband, as well as against the third party target, any questioning about the tape in this proceeding is now foreclosed. There is simply no way in which respondent's answers to the particular questions that are at issue here could constitute testimony directly adverse to her husband.[2]

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[2]The statement in respondent's brief that "it was found respondent's testimony would implicate [her husband]" (Br. in Opp. 2) is incorrect. Neither court below made any such finding. Both based their holdings on the government's acknowledgment that respondent's testimony was sought in order to obtain an indictment against a third-party, who might later elect to testify against respondent's husband before a different grand jury. See Pet. App. 3a-4a, 31a-32a.

Respondent appears to suggest (e.g., Br. in Opp. i, 1, 7) that the government's sole purpose in seeking her testimony is to obtain an indictment against her husband. This is not the case. Our primary interest is in obtaining an indictment of the third party target, who is not entitled to the benefit of respondent's marital privilege. However, we believe we are within our rights in declining to grant the derivative use immunity that respondent seeks for her husband, since any subsequent use of the third party's testimony against the husband would be too attenuated to fall within the protection of the marital privilege.

2. Respondent also argues (Br. in Opp. 3-4) that her testimony is not really essential to the grand jury investigation because the government seeks merely to corroborate testimony of her co-defendant implicating the third-party target. In support of this argument respondent cites a footnote in an article written by the Assistant United States Attorney who handled the case below. However, nothing in the article or in any other source cited by respondent supports the contention that respondent's testimony was not crucial to the government's case. Corroboration of disputed facts often is essential, particularly when, as in this case, the only other evidence of a fact is provided by an individual who previously has entered into a plea bargain with the government. Caution on the part of the prosecution in such cases is not only commendable; it is vital to the government's chances for success. Indeed, in the very passage of the article quoted by respondent (Br. in Opp. 3), the prosecutor termed her testimony "an essential condition precedent to presentment of an indictment" against the third party target of the grand jury. Br. in Opp. 3-4, quoting Purdy, *The Marital Privilege: A Prosecutor's Perspective*, 18 Crim. L. Bull. 309, 314 n.37 (1982). To this day the government has been unable to obtain an indictment of the third party target; the reason is that respondent has continued to invoke the marital privilege and to refuse to testify against him. As we have suggested in our petition (Pet. 6-16), this case is a clear example of the harm to law enforcement that is likely to result from application of the court of appeals' overly expansive view of the marital privilege.

3. While not disputing the existence of a conflict among the circuits on the issue of the availability of the marital testimonial privilege to co-conspirator spouses, respondent suggests (Br. in Opp. 14-15) that questions concerning application of the marital privilege are more appropriately resolved by the lower courts on a case-by-case basis and that

this Court should refrain from resolving the conflict for that reason. Of course, case-by-case determination by the lower courts will be the practice in most cases involving invocation of the marital privilege. However, the question of the availability of the privilege in the co-conspirator context is a discrete and important one that is fully ripe for this Court's consideration. As for the "fruits" issue, which in some instances might be merely a matter of line drawing appropriately left to the lower courts, we urge that it is desirable and entirely appropriate for this Court to provide guidance to the lower courts in the present case, in which the courts below have expanded the privilege far beyond its traditional scope and far beyond the limits suggested by "reason and experience."[3]

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[3]Respondent suggests (Br. in Opp. 10) that it would be preferable to await further appellate decisions involving application of the marital privilege because this Court stated the purpose of the privilege so recently in *Trammel* v. *United States*, 445 U.S. 40 (1980). However, the purpose of the privilege was recognized long before *Trammel*. Moreover, as the cases we discussed in our petition suggest, the courts of appeals have had ample recent experience, both before and after *Trammel*, with assertions of the marital privilege, including invocation of the privilege before a grand jury. There is no reason to delay consideration of this case in which the courts below so clearly departed from this Court's admonition in *Trammel* (*id.* at 50) that the privilege should be strictly construed.

Respondent also argues (Br. in Opp. 13) that the government has not made a sufficient showing that she and her husband were engaged in joint criminal activity. We do not dispute that the government should be required to make some preliminary showing in order to justify application of a co-conspirator exception. Whatever that showing must be, it surely has been made in this case, in which respondent has pleaded guilty to participation in a conspiracy and the questions the government wishes to ask her relate only to that conspiracy.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11

APPENDIX

PROPOSED QUESTIONS—[JANE DOE] *

1. [Respondent did not refuse to answer question 1, which merely required her to confirm her guilty plea.]
2. In , did you have a discussion with [Samuel Smith] about obtaining methamphetamine from [Richard Roe]?
3. In , did you ride in a car with [Samuel Smith] to a location in New Jersey where you waited while he went to another location to obtain methamphetamine?
4. On that occasion, did you wait at a restaurant called "Bogarts" while [Samuel Smith] went to the second location?
5. Was the second location the residence (if not, what was it) of [Richard Roe]?
6. On that occasion in did [Samuel Smith] obtain approximately 1 pound of methamphetamine from [Richard Roe]?
7. To your knowledge, what was [Richard Roe] to obtain (or what did he obtain) in exchange for providing the one pound of methamphetamine?

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*In our petition we used the fictitious names "Jane Doe" and "John Doe" to refer to respondent and her husband (see Pet. 1 n.1), and that practice is continued here. Other fictitious names used in this appendix are "Richard Roe" (the third-party target of the grand jury), "Samuel Smith" (respondent's co-defendant, who also pleaded guilty), and "James Jones" (an informant). The question in this Appendix are taken from C.A. App. 23a-26a.

8. Was the arrangement that one gallon of P2P would be exchanged for the pound of methamphetamine?

9. Did [Samuel Smith] walk from the location where you waited to the place where he met [Richard Roe]?

10. How long was [Samuel Smith] gone before he returned with the methamphetamine?

11. What was [Smith] carrying the methamphetamine in?

12. Who drove the car from that location and where did you go?

13. Did [Samuel Smith] give you that one pound of methamphetamine on that occasion?

14. When did he give it you?

15. On or about in Southampton, PA did [Samuel Smith] deliver 14.2 grams of the aforementioned methamphetamine to [James Jones] for $450.00?

16. Were you present on that occasion? Where exactly were you?

17. After [Smith] gave [Jones] the 14.2 grams (net weight) did [Samuel Smith] ask you to get the rest of the methamphetamine? Did you do so, and where did you get it from?

18. Subsequently, on that date, in the same location, did you give approximately 16.58 grams (net weight) of methamphetamine to [Samuel Smith] who then delivered it to [James Jones] for approximately $450.00? Was that methamphetamine part of the one pound [Samuel Smith] had obtained from [Richard Roe]?

19. On or about , did [Samuel Smith] sell [James Jones] 116.5 grams (net weight) of methamphetamine for $3,200.00? Where did this transaction take place? Were you present when this transaction took place? Was this methamphetamine part of the one pound [Samuel Smith] got from [Richard Roe] as described earlier?

20. On or about at a location in Southampton, Pennsylvania, did you give [Samuel Smith] a plastic bag containing 6.28 grams (net weight) of methamphetamine which he sold to [James Jones] in your presence in exchange for $240.00 which [Samuel Smith] turned over to you? Where was that location? Was that methamphetamine part of the one pound [Samuel Smith] had obtained from [Richard Roe]? If not, where did that methamphetamine come from?

21. On or about , did you transport approximately 2 pounds (gross weight) of methamphetamine to your residence at?

22. From whom did you obtain the methamphetamine, and in exchange for what?

23. Did you obtain that methamphetamine from [Richard Roe]?

24. Did [Roe] call you about this methamphetamine, and did you call [Samuel Smith] and ask him to accompany you?

25. Did [Smith] wait for you while you obtained the methamphetamine from [Roe]?

26. Where did he wait for you? (Was it near the first circle south of Route 130 in Gloucester, N.J.?)

27. How long after you dropped [Smith] off did you return to pick him up? Did you return to his apartment?

28. What type of container was the methamphetamine transported in and who carried it?

29. When you arrived at [Smith's] apartment did he take the two pounds of methamphetamine from you? Did you subsequently call him to obtain all or part of it back?

30. Did you proceed to his apartment where [Smith] gave you one pound of the methamphetamine? Did he express an intent to sell the other pound?

31. On or about , did [Samuel Smith] sell [James Jones] approximately 7.4 grams (net weight) of methamphetamine for $250.00? Were you present during that transaction? If not, were you aware of that transaction? Was that methamphetamine part of the two pounds of methamphetamine which you obtained from [Roe]?

32. On or about , was a location in the Eastern District of Pennsylvania searched where [Smith] was present in which 358.3 grams (net weight) of methamphetamine was found? Were you present on that occasion? Was that methamphetamine part of the two pounds of methamphetamine which you obtained from [Roe]?

* * * * *

[Intervening questions related to the tape recorded conversation and were struck down as the product of an illegal interception of an oral communication.]

44. To your knowledge, from whom did [Richard Roe] obtain the previously described methamphetamine? When was it obtained and at what location?